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A TREATISE

ON

THE PRICE ACT

RELATING TO REAL ESTATE IN PENNSYLVANIA

Act April 18, 1853, P. L. 503

BY

ROLAND R. FOULKE

OF

THE PHILADELPHIA BAR

Author of "The Rule Against Perpetuities, &c., in Pennsylvania"

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Preface

Mr. Price's[1] treatise on the act[2] commonly referred to by his name, has been out of print for many years, and was written so soon after the act was passed that whatever its merits, it is of very little use at the present time. Section 9 of the act[3] has already been discussed, and it is hoped that the great practical importance of the other sections will justify this discussion of them. Since there are several other statutes in force, in some respects duplicating the provisions of the Price Act, it has been found necessary, for the sake of clearness, to refer to them in some detail, and the act is so generally administered in the Orphans' Court that some observations have been introduced on the nature and effect of Orphans' Court sales in general. A number of forms have been inserted in an appendix which may add to the practical usefulness of the book.

In conclusion, I desire to acknowledge my indebtedness to Judge John Marshall Gest, of the Philadelphia Orphans' Court, for the great interest he has taken in this work and for many helpful suggestions. Indeed, without his encouragement, I doubt if the book would ever have been written.

This discussion covers the laws of 1913, and the citations have been brought down to 244 Pa. and 55 Super. Ct., each inclusive.

ROLAND R. FOULKE.

Philadelphia, June 1, 1914.

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(1) Eli K. Price, an eminent member of the Philadelphia Bar, who flourished during the middle of the last century.

(2) April 18, 1853, P. L. 503.

(3) Relating to Accumulations. See Foulke, Rule Against Perpetuities in Pennsylvania, etc. (1909), Chap. 25, p. 371.

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INTRODUCTION

§ **1.** The State unquestionably has power to control the use, transfer and devolution of property, and that power is limited in this country by public opinion and by various constitutional provisions which may be summed up for the purposes of our discussion in the requirements that (1) there must be some adequate reason for regulating the ownership of property, (2) just compensation must be made to an owner whose property is taken, and (3) the proceedings must be by due process of law.

§ **2.** The statutes relating to the use and devolution of property lie outside the scope of this discussion, which is concerned solely with a part of the law relating to the transfer of property, The question of just compensation and due process of law are of subordinate importance and will be passed for the present. The adequate reasons for the exercise of the power of regulating the transfer of property will vary from time to time in different communities and at different times. So far as we are concerned, the cases generally provided for by law may be summarized as follows under the divisions of involuntary alienation and voluntary alienation, which, however, overlap each other at certain points.

§ **3.** Involuntary alienation is prescribed in the following cases: (1) Where it is necessary to sell property in order to satisfy some lien or charge, as the lien of debts or legacies, or to satisfy judgments, and the principle is the same whether the obligation is that of a deceased or a living person. In each case the property is turned into money in order to satisfy some lawful charge. The alienation here is involuntary as to an heir or a devisee when it may be voluntary as to a testator. (2) Where it is desirable to appropriate private property for a public use,—the exercise of the power of eminent domain. (3) Where the absolute ownership of property is divided into different estates or is qualified by some trust or special limitation preventing some one or all of the owners from disposing of the property. In this case an alienation may be authorized, involuntary as to some of the owners. This case will be noticed again when we discuss voluntary alienation. The typical instances under this heading

are where property is subject to contingent remainders or executory devises or where there is an estate tail or a modified fee.

§ **4.** The case of ownership in common is, however, not regarded as an adequate reason for authorizing one co-tenant to compel the others to join in a transfer of the property, since the law provides another method of escape from the accident of undivided ownership, that is, by proceedings in partition. Where one of the co-tenants is under a disability, as minority, the law may authorize him to join with the others in a voluntary alienation. The cases of voluntary alienation authorized by law are those where the owner cannot under the existing law, because of some disability, make the transfer himself. The principal instance of this are minority, coverture, insanity and drunkenness, trustees who have no power of sale or cannot exercise the power conferred.

§ **5.** We must again look at the case before noticed, where the absolute ownership is divided into different estates or is qualified by some trust or special limitation. Some owner of the property desiring voluntary alienation invokes the aid of the law (a) to compel the other owners to join in the transfer, (b) to enable him to make the transfer without their joinder, (c) to remove some defect inherent in his title, and preventing him from making a transfer or joining with the others in a transfer. Where the other interests are vested, the law only authorizes the owner to remove some defect inherent in his own title. Where the other interests are contingent, he may be authorized to transfer without their consent but may not compel them to join in the conveyance.

§ **6.** In the case of a trustee, legislative interposition is really not needed for a court of equity obviously had power to authorize the conveyance without the aid of a statute and protect the purchaser from a subsequent claim of the cestui que trust. In Pennsylvania, however, the limited notions of equity and cramped jurisdiction of the courts prevented this principle being generally recognized.

§ **7.** These are the principal headings of the legislative interposition upon the alienation of real estate. A number of statutes have been passed in Pennsylvania providing for these different cases, and one of them, the Price Act, the Act of April 18, 1853, P. L. 503, and its supplements, will be the subject of our discussion.

§ 8. There are several other cases which do not strictly come within the headings we have referred to, but which are provided for by the act in question. For instance, one case is where the owner of property is absent and unheard of under circumstances from which the law will presume his decease. In this case, the statute provides for a transfer of the property by someone appointed to act on his behalf. This is merely a case of a prescribed manner of establishing a presumption of a fact which probably exists, but is not susceptible of proof in the usual manner. This and several other cases will be discussed in their proper place. We have said enough perhaps to indicate the place in the law of the subject matter of the pages which follow.

CHAPTER I.

Preliminary Discussion.

Object of the statute and general view thereof ..... § 10
Constitutionality ..... § 11
No compulsory sale of vested interests owner sui juris ..... § 12
Jurisdiction
Confined to cases specified ..... § 13
(Note: Table of cases in the act and its supplements.)
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Object of the Statute.

§ 10. Upon the whole statute it is first to be observed that it was obviously designed[1] to promote the alienability of real property and vest in the courts the jurisdiction to determine the propriety of the disposition of a title in a case provided for in the statute.[2]

The court is authorized in the cases specified, upon petition

(1) The full text of the statute and its supplements will be found in Appendix A. The preamble is as follows: "Whereas, The general welfare requires that real estate should be freely inalienable," (should be alienable, obvious misprint) "and be made productive to the living owners thereof. And Whereas, In matters which the judiciary is competent to hear and decide, it is expedient that the courts should adjudicate them after a full hearing of all parties, rather than that they should be determined by special legislative acts upon an ex parte hearing."

(2) For some remarks on the object of the act, see Ludlow, J., in Bridesburg Land Co.'s Petition, 7 Phila. 436 (1870), s. c. 27 L. I. 317; Penrose, J., in Yard's Est., 17 Phila. 436, (1885), s. c. 15 W. N. C. 422, 42 L. I. 17; Rice, P. J., in Merrell v. Merrell, 5 Pa. C. C. 531 and 533 (1888), s. c. 5 Kulp 125, 6 Lanc. L. R. 17; Thompson, J., in Gilmore v. Rodgers, 41 Pa. 120 (1861), s c. 9 Pitts. L. J. 209, sub nom. Gilmore v. Rogers, 19 L. I. 28; Holmes's

of the proper parties, to decree a sale, mortgage, lease or conveyance on ground rent, etc., of the property if certain circumstances exist, with a proviso as to the method of proceeding and the effect of the decree on the title. The statute applies exclusively to the legal title to real estate,[3] and specifies certain cases in which the courts may authorize the disposition mentioned in the act.[4]

It was formerly the practice to procure a special act of assembly when any one of the cases specified arose, and the Price Act was designed to obviate the necessity of such frequent application to the legislature.[4a]

Constitutionality of the Act.

§ 11. The constitutionality of the Price Act has been sustained in all cases where the question has been raised.[5] It is valid in so far as it provides for the sale, etc., of property under circumstances which are generally regarded as sufficient to authorize the interposition of the legislature,[6] and in so far as it does not provide for the sale, etc., of property owned in fee simple by a person sui juris.[7] There are several provisions of the act which seem to provide for the sale, etc., of the vested interests of a sui juris owner without his consent,[7a] and may, therefore, although

App., 53 Pa. 339 (1867); Penrose, J., in Orwig's Est., 7 Pa. C. C. 71 (1889), s. c. 19 Phila. 158, 46 L. I. 99; Strong, J., in Smith v. Townsend, 32 Pa. 434 (1859), s. c. 16 L. I. 92.

(3) See § 15, post.

(4) See § 13, post.

(4a) For a discussion of some of the cases arising under these special acts, see Price on The Act for the Sale of Real Estate (1874), p. 12, et seq. p. 65.

(5) The constitutionality of the act was discussed in the following cases: Grenawalt's App., 37 Pa. 95 (1860), s. c. Luz. L. Obs. 243, subnom. Greenawalt's App., 17 L. I. 404; Freeman's Est., 181 Pa. 405 (1897); Smith's Est., 207 Pa. 604 (1904).

(6) See § 1, ante.

(7) The unconstitutionality of an attempt by the legislature to compel a transfer of property without an adequate reason, is illustrated by the Act of April 15, 1869, P. L. 47, authorizing the owner of property, subject to an irredeemable ground rent, to compel a sale of the ground rent to him, which act was declared unconstitutional in Palairet's App., 67 Pa. 479 (1871).

(7a) See § 129, post, as to possibility of reverter after a modified fee. See § 148, post, as to exercise of a power of sale before time fixed for its execution. See § 12, post, as to compulsory sale of a vested interest.

there is no authority for the statement, be regarded as unconstitutional. The validity of the provisions as to a contingent remainder, executory devise, and estate tail, is sustainable on well-recognized historical grounds.[7b] The constitutionality of the clause providing for the disposition of the title of a person absent and unheard from for more than seven years under circumstances from which the law will presume his decease, is not free from doubt,[7c] and it will be unsafe to take a title under this clause until the Supreme Court has sustained its constitutionality. The discussion of this subject belongs more properly to a treatise on constitutional law, and will, therefore, be omitted, although a few of the principles involved are referred to in the note.[8] The better opinion probably is that the provision is constitutional.

(7b) As to the constitutionality of the act in providing for the divesting of contingent remainders and executory devises, see Smith's Est., 207 Pa. 604 (1904). As to the divesting of vested remainders after an estate tail, see § 92, post.

(7c) Query: Does the same objection apply to the clause providing for the sale, etc., of the title of a married woman whose husband has abandoned her for two years or been absent and unheard from for seven years?

(8) The arguments as to the constitutionality of the clause in the Price Act providing for the disposition of the title of an absentee are probably as follows:

1. The clause is unconstitutional because (a) no sui juris owner of a vested interest in property may be deprived of that interest by ex parte judicial proceedings of which he has had no notice; (b) the application of this principle to the case in question is illustrated by the case of Scott v. McNeal, 154 U. S. 34 (1894), 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, which decided that an administrator's sale under order of a court of probate of the property of a living person is void even though that person had been absent for more than seven years, and the court had investigated the circumstances of the absence before issuing the letters of administration, see Devlin v. Commonwealth, 101 Pa. 273 (1882).

2. To this argument it may be answered that the case of Scott v. McNeal, supra, is inapplicable to the matter in hand since the decision in Cunnius v. School District, 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125, aff. 206 Pa. 469, which reversed 21 Super. Ct. 340, s. c. 25 Pa. C. C. 17, and which affirmed the constitutionality of the Act of June 24, 1885, P. L. 155, providing for the administration and distribution of the personal estate of a person absent and unheard from for more than seven years on the ground that such a statute is the exercise of a power which has from time immemorial been generally regarded as exercisable by a sovereign state over property within its jurisdiction, and being within the police power of the state, is constitutional so long as it (1) does not violate any express provision of the constitution, (2) provides for (a) a reasonable period of

No Compulsory Sale of Vested Interest, Owner Sui Juris.

§ 12. The act, therefore, does not, and could not constitutionally, except perhaps in the case of remainders after an estate tail, compel the sale, etc., of a vested interest owned by persons sui juris or authorize the divesting of such an interest against the consent of the owner.[9]

absence, (b) a reasonable amount of notice, (c) adequate safeguard for the protection of the interests of the absent one.

3. Since the Price Act applies to property within the jurisdiction of the State and adopts the same length of absence as that specified in the statute construed supra, and is on its face a regulation of the property of an absent one, it seems to follow that the only remaining objections to the constitutionality of the Price Act which may be urged are (a) that it does not provide for a reasonable notice, (b) that there is no adequate safeguard for the protection of the rights of the absentee.

4. In answer to this, it may be said (a) that the Price Act does not destroy the title of the absent one but merely changes the nature of the property to which that title attaches from real estate to personal property, a legislative provision which is admittedly constitutional, when the proceeds of the sale are adequately safeguarded; (b) that the act expressly provides that the court shall not make the decree prayed for unless (1) they shall be of the opinion that it is to the interest and advantage of the parties, (2) it shall appear that the person in question has been absent and unheard from from more than seven years, etc., which fact must be duly inquired into by the court; (c) the act expressly provides for notice to all parties, and leaves it in the discretion of the court to make such orders as to notice as may be necessary in each particular case; (d) no question as to notice can be raised, therefore, except in so far as it may be urged that the notice in any given case is, under the circumstances of that case, so inadequate as to be unreasonable; (e) the rights of the absent one are adequately safeguarded because the act provides that the proceeds of the sale shall take the place of the land and be subject to the same right and title; the absentee, or his heirs or devisees, are, therefore, entitled to the purchase money, for the safe custody of which security must be ordered. The doubt as to the distribution of the purchase money does not affect the title of the purchaser because the right of the absentee is transferred intact from the land to the proceeds. This clause, therefore, admirably promotes the object of the statute in furthering the alienability of real estate.

5. This provision of the Price Act may, therefore, be held constitutional, and the Act of 1885, supra, unconstitutional. If the Act of 1885, supra, is constitutional, a fortiori the provision in question is constitutional.

6. Since the Price Act does not provide for the distribution of the proceeds to anyone except the absentee or his heirs or devisees, it follows that they must be distributed, if at all, in his absence, under the Act of 1885, supra.

(9) For a discussion of the divesting of vested remainders after an estate tail, see § 92 post. See § 129 post. See § 148 post.

Thus, in Van Dusen's Est.,[10] where a tenant for life petitioned for a sale of part of the land alleged to be unimproved, unproductive, and a source of great expense, for the payment of municipal improvements, which sale was opposed by three of the eight devisees in remainder, the court held that as there was no trust, no contingent remainders or executory devises, the owners of full age and under no disability, that there was no jurisdiction under the Act of 1853 or any other act.[11]

So also in Kerner's Estate,[12] there was a petition by a life tenant for leave to sell real estate on the ground of its unproductiveness, which was objected to by vested remaindermen, and in consequence refused, the court saying that no act of assembly authorized such a proceeding. Ashman, J., pointed out that the sweeping language of Mitchell, J., in Freeman's Est.[13] was not to be regarded as an authority for the granting of the petition in such a case.[14]

A lease and possibly a mortgage might be authorized against the consent of vested interests in remainder, because in this case there is no divesting of the interest or compulsory transfer thereof, but merely an act done in furtherance of the proper administration of the property, which, if well advised, would benefit all parties concerned. The proceeds of the mortgage in such a case must, of course, be spent upon or in ease of the property.[14a] Any diversion of them to another purpose would be, to that extent, a divesting of the vested interests and contrary to the express provisions of the statute.

(10) 11 Pa. C. C. 201 (1892), s. c. 29 W. N. C. 573, 1 D. R. 156. For a case where there was apparently a sale by a trustee with a joinder of the vested remaindermen, see Owens' Est., 15 Pa. C. C. 196, s. c. 3 D. R. 331 (1894).

(11) As to the unconstitutionality of earlier acts attempting to divest vested interests of owner sui juris, see Ervine's App., 16 Pa. 264 (1851); Kneass's App., 31 Pa. 87 (1825).

(12) 30 Pa. C. C. 175 (1904), s. c. 13 D. R. 311.

(13) 181 Pa. 405 at 408 (1897).

(14) For a case where the parties were all sui juris and able to make a deed to the property without the decree of the court, yet for some unexplained reason, they petitioned under the Price Act and had a trustee appointed to make the sale, see Carrier' App., 79 Pa. 230 (1875). For a case of a sale by trustees upon petition of cestui que trusts having the entire interest and entitled to terminate the trust, see Brooke's Est., 214 Pa. 46 (1906).

(14a) See § 47 post, as to mortgage money.

Jurisdiction.

Confined to Cases Specified.

§ 13. The courts have jurisdiction to enter the decree authorized by the act only in the cases therein specifically enumerated. Unless it appears that one of the defects in the title mentioned is present the proceeding will be null and void.[16] This is so because the Orphans' Court have no jurisdiction at all,[17] and the Court of Common Pleas have no equitable jurisdiction in Pennsylvania except where specifically conferred by statute.

The cases in which the court has jurisdiction are not arranged in the act in logical order, so we have departed from it and rearranged them as indicated in the table in the note.[18]

(16) This subject will be further discussed under the heading of Collateral Attack. See § 240 post.

(17) The Orphans' Court has no advisory jurisdiction, Morton's Est., 201 Pa. 269 (1901), Jacoby's Est., 201 Pa. 442 (1902), Willard's Est., 65 Pa. 265 (1870). But see Phila.'s Pet., 2 Brewst. 462 (1868); Rogers's Est., 16 W. N. C. 228 (1885), contra. And the jurisdiction is not ousted by a direction to the executors to construe the will with a provision that their decision shall be final: Reilly's Est., 200 Pa. 288 (1901). Accordingly, in the following cases the petition was dismissed: Carpenter's Est., 17 D. R. 170 (1908); substituted trustees had power to sell. In Crawford's Est., 221 Pa. 131 (1908), the circumstances alleged, to-wit, the lien of debts not of record, did not exist.

(18) TABLE OF THE CASES TO WHICH THE PRICE ACT AND ITS SUPPLEMENTS APPLY.

A. Legal disabilities as to conveyance of title
- Where legal title is held by
  - Minors
  - Lunatics so duly found by inquisition
  - Habitual drunkards so duly found by inquisition
  - Married woman whose husband has
    - Abandoned her for two years
    - Been absent and unheard from for seven years.
  - Husband with wife who is
    - Lunatic
    - Minor
  - Where any party interested is under a legal disability to sell and convey
  - Corporations
  - Religious, beneficial or charitable societies or associations incorporated or unincorporated

Jurisdiction as Between Orphans' Court and Common Pleas.

§ **14.** The act provides in the first section as follows: "That in all cases where real estate shall have been acquired by descent or last will, the orphans' court, and in all other cases the courts

B. Legal limitations of and liens upon the title
Estate tail
Title, where, is subject to
Contingent remainders
Executory devises
Lien of decedents debts not of record
Vested remainders which are liable to open and let in after-born children
Lands devised or granted for life or the life of another with remainder limited to a class of persons, some or all of whom may not be in being at the time of making the decree. Act June 15, 1897, P. L. 159. Jurisdiction only conferred on Orphans' Court
Where property is devised or granted for special or limited purposes.
C. Trusts superimposed on the legal title. Equitable limitations of the title.
For the sole and separate use of married women
For minors.
For religious, beneficial or charitable societies or associations incorporated or unincorporated
For or by any other corporation
By trustees for any public or private use or trust
Generally in all cases where estates are devised or granted in trust for special or limited purposes
Trustees, purchase and sale of real estate.
When ground rents shall have been reserved
When real estate shall have been purchased and be held by any person acting in a trust or fiduciary capacity
C. Powers over the legal title
Where power of sale may exist and
Time not arrived for its exercise
Time limited for its exercise has expired
1 Preliminary act not done to bring it into exercise
Persons required to consent or join in its execution are any one or more
(a) Non compos mentis
(b) Removed out of the state
(c) Deceased
(d) Refuse to act
(e) Unreasonably withhold consent

of common pleas, of the respective counties of this commonwealth, shall have jurisdiction to decree the sale, mortgaging, leasing or conveyance upon ground rent of such real estate in

Powers of appointment

Defective appointment in any deed or last will and testament, and the necessary power is not given to the executor, devisee or appointee to make sale or conveyance of real estate.

Every power to sell in fee simple.

Real estate created by deed or will shall be taken to confer authority

(1) to sell and convey, reserving ground rent, or rents in fee, and the same to release or extinguish according to law and the stipulation of the deed

(2) to grant and convey such ground rent or rents to any purchaser free of all trusts

E. Parol contract of decedent

Where decedent shall have contracted by parol to sell real estate and those interested do not think it expedient to plead the statute requiring contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold.

F. Partition

When in proceedings in partition in equity it shall appear that real estate cannot be divided without prejudice to the interest of the owners

Trustees, guardians, committees, married women and corporations to make and take conveyances without public sale to perfect partition

G. Exchange.

Trustees, guardians, committees, married women and corporations to make and take conveyances, to square and adjust lines between adjoining owners without public sale

H. Trustees, guardians, committees, married women and corporations

To purchase real estate when necessary to protect any security or rent held on property exposed to judicial sale.

To join with other undivided interests in making and taking deeds without public sale, to change in part or in whole the route or location of any right of way or passage existing over and upon adjoining or other lands. Security in the discretion of the court. (Act of April 18, 1864, P. L. 462, Sec. 1.)

To purchase other real estate when needful (adjoining) to that already owned by any such party or useful to the business thereupon carried on.

I Trustees of religious societies, corporations or church organizations to sell to associations or corporation for exclusive purpose of a cemetery or place of sepulchre for the dead. (Act of March 24, 1877, P. L. 39, Sec. 1.)

the cases hereinafter described.[19] The only difficulty was where the title was derived partly by deed and partly by will or descent. It was accordingly provided by the Act of April 27, 1855,[20] that in such case either the Common Pleas or the Orphans' Court might take jurisdiction,[21] and by the Act of April 21, 1856,[22] sales of real estate of lunatics, in the case where the title was derived partly by deed and partly by will, were confirmed. The decree of the Orphans' Court confirming a sale under the Price Act is conclusive on the Common Pleas.[24] Both courts would hardly entertain jurisdiction of the same proceeding, and should such a case arise, the court to which the second application was made would very probably refuse to entertain the petition.[24a]

Jurisdiction is Only as to Real Property.

§ **15.** The jurisdiction under the act is conferred solely as

J. Persons presumed to be deceased
Whenever the owner of real estate may have been absent and unheard from for seven years, under those circumstances from which the law will presume his or her decease.

K. Trustees, treasurer or other proper officers of a church, congregation, presbytery or other church organization, to sell real estate used as a burying ground. Act of May 23, 1887, P. L. 168, C. P.

(19) This clause may confine the jurisdiction to cases of title acquired by gift. By a subsequent clause the courts may enter a decree where real estate shall have been purchased and held by any person acting in a trust or fiduciary capacity. See § 56, post. In the following cases the jurisdiction was in the Common Pleas: Carswell's Pet., 1 Phila. 521 (1854), s. c. 12 L. I. 14; Swift v. Harbison-Walker R. Co., 228 Pa. 584 (1910), Owens' Pet., 3 D. R. 328 (1894) In the following cases the jurisdiction was in the Orphans Court: Morrison v. Nellis, 115 Pa. 41 (1887), s. c. 19 W. N. C. 20, 44 L. I. 187, 34 Pitts. Lg. 274, 14 Lanc. L. R. 968.

(20) P. L. 368, Sec. 5.

(21) Jurisdiction under this act in the following cases: Reed v. Palmer, 53 Pa. 379 (1867), deed and will, Common Pleas. Goddard's Est., 198 Pa. 454 (1901), aff. 9 D. R. 703 (1900), deed and will, Orphans' Court. Fell's Est., 14 Phila. 248 (1880), s. c. 9 W. N. C. 382, 38 L. I. 6. In Sharp's Pet., 6 Phila. 153 (1866), s. c. 23 L. I. 412, the petition in the case of a testamentary trust was presented in the Court of Common Pleas. The petition was dismissed on other grounds, and question of jurisdiction was not discussed.

(22) P. L. 486, Sec.

(24) Mercer Home v. Fisher, 162 Pa. 239 (1894).

(24a) See § 203, post, as to orphans' court sales. See Stadelman's Est., O. C. Phila. Co., Oct. Term 1913, No. 742, not reported.

to real property, and the courts have no power under its provisions to make an order concerning personal property. This is so clear that no question as to it has ever been raised. It does not appear [25] that the jurisdiction of the court extends to the equitable interest of the cestui que trust. If such equitable interest is considered as personal property, as it sometimes is, we have another reason why a decree will not be made in such cases.

Jurisdiction as Respects Situs of the Land.

§ **16.** In the case of proceedings under the Price Act, it will be found that the condition of the estate is immaterial. The act is simply designed to remove obstacles to the alienation of property and provide means by which, in the cases specified, where there is some defect preventing the transfer of the title, the court may, in spite of the difficulty, authorize a sale, etc. The propriety of the sale, etc., therefore depends entirely on the condition of the title to the land, and the advantage to the parties interested of that particular sale, etc., with reference to the land in question. These questions are to be determined solely by the court having jurisdiction over the land. Indeed the jurisdiction is clearly confined to the court of the county where the lands lie by the words of the act providing in Sec. 1, "that any such court in the county where the land shall be situate shall be of opinion," etc. It is not necessary, therefore, in the case of a proceeding under the act, to make application anywhere except in the court of the county where the land lies.

In the case, however, of proceedings for a sale for the payment of debts where the orphans' court of another county has jurisdiction of the accounts, then the two courts must concur for the reason that the necessity of the sale under the terms of the statute depend on the condition of the decedent's estate, and the only court which can inquire into that, is the court having jurisdiction over the accounts, and the same is true of many cases of proceedings by executors and guardians.

Where the court authorizes trustees to buy land in another county, it is not necessary to apply to the court of the county where the land lies because the owner of the land may sell to whom he pleases, and the court of his county has no jurisdiction over him. The only question involved is one of a propriety of

(25) See § 140, post.

investment determined solely by the court having jurisdiction over the accounts of the trust.[26]

Consent, No Jurisdiction By.

§ 17. It may be added that jurisdiction under the act cannot be conferred by consent. Thus, in Crawford's Estate,[27] the court decided that the consent of the heirs would not validate a sale to relieve from the lien of decedent's debts when the sale was not confirmed within two years.[27a]

General Discussion of Notice

§ 18. The clause requiring notice to be given to all parties is essential to the constitutionality of the act.[28] This section of the statute speaks for itself and requires very little comment. Where there is no opposition to the proceedings it is more expedient to have all parties join in the petition which obviates the necessity of preparing an answer. In other cases service must be made personally, which may be in any part of the United States and the territories thereof, or if no personal service can be made,

(26) For such a case see Derr's Est., 203 Pa. 96 (1902). Aff. 10 Kulp 438 (1901).

(27) 221 Pa. 131 (1908).

(27a) Willard's App., 65 Pa. 265 (1870); in this case the court refused to entertain jurisdiction of a petition to construe the terms of a will, the decree of the court below being reversed and petition dismissed. See § 253, post, as to mistake.

(28) The provisions as to notice in Sec. 3 are as follows: "If all proper parties shall not have voluntarily appeared as petitioners or respondents, the court shall fix a day for parties to appear, and cause a citation to be served on all persons in being who shall not have appeared, and who shall have any present or expectant interest in the premises, warning them to appear, and that they shall be heard on the day designed, and for those who cannot otherwise be served, cause advertisement to be made in manner most likely to afford notice, and services made in any part of the United States and the territories thereof, with oath or affirmation of the fact, taken before any judge or justice of the peace, and filed of record, shall be good service, and guardians shall be served and appear for their wards, and if minors shall have no guardian, the court shall appoint a guardian for them; committees shall be served and appear for lunatics and habitual drunkards, and husbands shall be served and appear with their wives, except husbands who shall have abandoned their wives for two years, or have been absent and unheard from for seven years, and if parties make default in appearing, the court, after an investigation of the facts, may proceed to make a decree in the premises."

advertisement shall be made in manner most likely to afford notice that is under the approval of the court.

Notice must be given to all parties in interest so that they may be heard as to the expediency of making the sale, etc., that is, whether it is to the interest and advantage of all concerned that the property be sold, etc. No one having a present or expectant interest will be affected by the proceedings under the act unless notified.[29] Where the record is lost, it will be presumed thirty years after the sale that notice had been given to the guardian of a minor having a contingent interest.[30] Where all of the heirs and parties in interest are made parties except a non-resident heir not heard from for thirteen years, and upon whom service by advertisement has been made by order of court, the court will make a decree authorizing the sale and the title will be good.[31]

Further questions as to notice will be discussed under the separate headings.[32]

Notice to Married Women.

§ 19. The clause providing that husbands shall be served and appear with their wives does not appear to have been construed or to have received much attention in practice. The phrase when strictly construed probably means that in every case where a married woman is a party to proceedings under the Price Act her husband must be served and appear with her unless he shall have abandoned his wife for two years or been absent and unheard from for seven years. Therefore, when she signs an approval of a petition under an act her husband should join in unless he comes within the exceptions mentioned. The clause on the other hand may be construed to mean that the husband is to be served and appear only in the case where the proceedings are taken under the act as to the title of a married woman to free her from a disability arising out of the coverture. In the absence of any authority, no statement can be ventured, and

(29) Smith v. Townsend, 32 Pa. 434 (1859). See Collateral Attack, § 240, post.

(30) Smith v. Schwarz, 209 Pa. 79 (1904).

(31) Freker v. Berg, 193 Pa. 442 (1899).

(32) See § 240, post, as to Collateral Attacks, § 97, post, as to Contingent Remainders, § 169, post, as to Persons Absent and Unheard from for Seven Years, § 63, post, as to Minors, § 138, post, as to cestui que trusts.

it therefore seems desirable to follow the safe practice and have the husband join in every case.

The Act Construed with Existing Legislation.

§ 20. It so happens that many provisions of the statute are coterminous with or overlap previous statutes.[33] Particularly is this so with respect to the case of the sale of the interest of a minor, specific performance of decedent's parol contracts, and no small confusion has been caused by these circumstances. The distinction between these acts will be pointed out at the proper place.[34]

So far as the acts relating to the sale for payment of debts is concerned, the provision in the Price Act relating to the lien of decedent's debts is entirely different from the other acts, and there is no overlapping, in this respect differing from the case of the sale of the interest of a minor.[35]

Court may Ratify that which it could Authorize in Advance.

§ 21. The Price Act provides that the court may decree such sale, etc. This would clearly embrace a decree ratifying a sale, etc., etc., already made as well as an order for a sale, etc., in the future. If any doubt existed on this point, it has been set at rest by the Act of April 13, 1854.[36] which provides that all cases

(33) The provision in the statute as to its construction with respect to existing legislation is as follows: §2 "Provided, that nothing in this act contained shall be taken to repeal or impair the authority of any act of assembly, general or private, authorizing the sale of real estate by decree of court or otherwise, nor to affect or impair any right or powers otherwise existing in any persons or corporations to sell, mortgage, lease, or let on ground rent, any real estate.

(34) See § 64, post, as to minority. See § 152, post, as to specific performance of decedent's contracts.

(35) See § 115, post, as to lien of decedent's debts.

(36) P. L. 368, Sec. 3. "That in all cases wherein any of the courts of this Commonwealth might have authorized any sale or conveyance, or letting on ground rent or otherwise, and such sale, conveyance or letting, may have been made without the leave of such court, it shall be lawful for such court, if approving of such sale or conveyance or letting, to approve, ratify and confirm the same, with the same effect as if such decree had preceded such sale, conveyance or letting." This act applies to all orphans' court sales and is not confined to sales under the Price Act, Donnelly v. Byers, 234 Pa. 339 (1912).

where any court might have authorized any sale, conveyance, etc., and such sale, etc., shall have been made without leave of court, the court may, if approving the same, ratify with the same effect as if such decree had preceded such sale, etc. It was the law before the Act of 1854 that the orphans' court could ratify and confirm afterwards what it could authorize in advance.[37] The practice on this point is now settled beyond a doubt.[38]

Jurisdiction Extends to Undivided Ownership.

§ **22.** The jurisdiction of the court, by the express provisions of the act, is to be exercised whether such ownership or interest shall be held or enjoyed in severalty, joint tenancy, coparcenary, or in common with others. Under this clause, the jurisdiction of the court extends to the case where the holder of any undivided interest in property is subject to any of the legal disabilities mentioned in the act. This clause, however, does not, it seems, authorize one undivided interest to compel another undivided interest to join in the sale merely because the other undivided

(37) Bell's App., 66 Pa. 498 (1871), semble; Mussleman's App., 65 Pa. 480 (1870). In this case there was a bill in equity in the common pleas for specific performance of the executor's sale made without authority of the orphans' court, but which should have been approved by them. A demurrer was sustained without prejudice to the right to proceed in the orphans' court, with a dictum that that court could ratify on proceedings to confirm the sale.

(38) Bowker's Est., 12 Phila. 161 (1878), s. c. 35 L. I. 456. The petition of purchaser to have a sale vacated refused, the court having power under the Act of April 13, 1854, P. L. 368, Sec. 3, to validate the sale although minor irregularities therein. Sale also confirmed after made under the act itself or its supplement of 1854, in Charlton's Est., 12 Phila. 102, s. c. 35 L. I. 194 (1878). McCaffrey v. Gibney, 223 Pa. 368 (1909); Sheetz's Est., 29 Pa. C. C. 14 (1903), s. c. 12 D. R. 372, 17 York 44, apparently a petition by a minor to restrain a sale, report obscure. In Donnelly v. Byers, 234 Pa. 339 (1912), there was a sale under a power which did not divest the lien of decedent's debts, which was ratified by a subsequent order for sale for payment of debts rested on the provisions of the Act of 1854. Query: Why was the Price Act not resorted to? See § 128, post. For a case of a mortgage subsequently ratified, see Burton's Est., 16 Pa. C. C. 289 (1895), s. c. 4 D. R. 106 Ashman, J., refers to Act of April 18, 1853, § 3, probably a misprint for April 13, 1854. Corr's Est., 29 Pa. C. C. 276, s. c. 12 D. R. 788 (1903), Confer Hubley's Est., 16 Phila. 327 (1884), s. c. 41 L. I. 66; Burton's Est., 16 Pa. C. C. 289 (1895), s. c. 4 D. R. 106, mortgage subsequently ratified.

interest is under one of the legal disabilities, etc. [39] The remedy in such a case is by proceedings in partition.

If, however, all the undivided interests are subject to the same disability, as where they are all subject to the lien of decedent's debts, it seems that the court may compel an unwilling owner to join in the sale.[40] It is important furthermore to remember that the act provides[41] that no such private sale, leasing or letting on ground rent of an undivided interest shall be upon terms or at rates less favorable than others who of competent ability to contract and uniting in the sale of undivided interests shall accept. It is therefore necessary under this clause, in all cases of a private sale of undivided interests, for it to appear, if other parties are joining in the sale, that those who are sui juris are not receiving a larger price.

Where a Title to Property is Acquired by Purchase.

§ **23.** If it should be supposed that the language in the first section of the act would be construed to exclude the jurisdiction of the court from the case where the property was purchased by any fiduciary mentioned in the act, such doubt will disappear when we refer to the language in a subsequent part of the act,[42] providing that the jurisdiction shall be exercised "when real estate shall have been purchased and be held by any person acting in a trust or fiduciary capacity." This language seems to plainly extend the jurisdiction as to trusts, at least to all cases where the trustees shall have bought property after the trust was created.

Superfluous Provisions of the Act.

§ **24.** It seems clear that it will be entirely unnecessary to authorize any disposition by the court in a case where there is ample power independently of the statute to make the proposed conveyance, etc. Any statutory provision in such a case would be entirely superfluous. There are, however, several clauses in the Price Act which seem to come under this category, such,

(39) See remarks of Trunkey, J., in Spencer v. Jennings, 123 Pa. 184 (1888), at 195-196. See § 12, ante.

(40) Price on the act for the sale of real estate (1874) p. 121, 122.

(41) In Sec. 4.

(42) See § 56, post.

for instance, as the clause relating to corporations,[43] relating to purchase of real estate,[44] to leases,[45] etc. These will be noticed in the proper place.

Retroactive Application of the Act.

§ **24a.** Cases sometimes arise where the title has been acquired by descent or will prior to April 18, 1853. The question then arises whether such a case is within the provisions of the act. It seems clear that it is because that act provides in Sec. 1 that in all cases where real estate shall have been acquired by descent or last will, etc., the jurisdiction of the court shall attach.[46] It seems, however, that since the act in Sec. 2 provides, in enumerating the cases where the court is said to have jurisdiction, that such sale, mortgaging, leasing, etc., may be decreed whenever real estate shall be held for, etc., that there is room to argue that although the act applies to titles vesting before it was passed, yet the circumstances in which the court is to have jurisdiction must have arisen after April 18, 1853. No case has been found on this point. In the absence of any authority no statement of the law can be ventured.[47]

(43) See § 83, post.

(44) See § 56, post.

(45) See § 48, post.

(46) In Owens' Est., 15 Pa. C. C. 196 (1894), s. c. 3 D. R. 331, the court took jurisdiction under the act as to a trust created in 1844. See Hinkson v. Lees, 181 Pa. 225 (1897).

(47) § 9, relating to accumulations, is expressly confined to limitations under deeds or wills made after the passage of the act.

CHAPTER 2.

General Jurisdictional Facts.

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Preliminary.

§ **25.** It is provided that the court shall be of the opinion that the sale etc., is (a) to the interest and advantage of those interested, and (b) may be made without injury or prejudice to any trust, charity, etc., for which property may be held, (c) may be done without violation of any law which may confer an immunity or exemption from sale or alienation.[1] The require-

(1) The words of the act are as follows: "Provided, That any such court in the county where the premises shall be situated, shall be of the opinion that it is for the interest and advantage of those interested therein, that the same should be sold, mortgaged, leased or let on ground rent, and may be done without injury or prejudice to any trust, charity, or purpose for which the same shall be held; and provided, That the same may be done without the violation of any law which may confer an immunity or exemption from sale or alienation." It is apparently not necessary, from the remarks of Mitchell, J., in Brock v. Steel Co., 203 Pa. 249 at 253 (1902), to insert in the petition and decree the finding of the court in the above words. It is, however, much better practice to do so. See as to this appendix, B.

ment that no law conferring immunity or exemption from alienation shall be infringed obviously applies only to the case of a sale, mortgage, or conveyance on ground rent. There does not appear to be anything in the act to show that such a requirement must be found in the case of an exchange, lease, squaring and adjusting adjoining lines, changing location of right of way over adjoining ground, partition, specific performance of decedent's contracts, purchase of real estate, except in so far as the provision we have referred to may be considered as applying to all subsequent cases in the act, although not specifically referred to.

Whether to the Interest and Advantage is a Question of Fact.

§ **26.** The sale, mortgage, etc., must be to the interest and advantage of those interested therein. This is a question of fact to be determined by the court having jurisdiction of the proceedings.[2] The duty of investigation is in the court, and the title of an innocent purchaser does not depend upon the fidelity or sound judgment of the judges making the decree.[3] Like other similar questions of fact to be determined by the court below, the general rule is that the Supreme Court will not reverse findings of fact unless there is clear error.[4]

Where the court has entered the decree on the ground that it is to the interest and advantage, the question is res judicata, and a party in interest who had notice cannot attack the decree on the ground that it is not to his interest and advantage to have the decree made.[5]

(2) The court may appoint someone to inquire into the question of the expediency, as was done in Grenawalt's App., 37 Pa. 95 (1860) s. c. Luz. L. Obs. 243. Costs of reference should be paid out of principal, Lee's Est., 18 Phila. 2 (1885), s. c. 42 L. I. 488.

(3) Trunkey, J., in Morrison v. Nellis, 115 Pa. 41 (1886).

(4) Funck's Est., 16 Super. Ct. 434 (1901); Morrison v. Nellis, 115 Pa. 41 (1887), s. c. 19 W. N. C. 20, 44 L. I. 187, 34 Pitts. L. J. 274, 14 Lanc. L. R. 96. But in Smith's Est., 207 Pa. 604 (1904), the Supreme Court, in an opinion by Meztrezat, J., made an elaborate discussion of the facts concerning the expediency of the sale, although affirming the court below, a discussion which seems unnecessary under the rule we have referred to.

(5) Thomas's Est., 11 D. R. 290 (1902), petition to vacate decree in partition dismissed. Sheetz's Est., 12 D. R. 372 (1903), s. c. 29 Pa. C. C. 14, 17 York 44, petition of a minor who had come of age, to vacate sale, joined in by his guardian under a decree entered under the Act of 1853.

To the Interest and Advantage in Case of a Mortgage.

§ **27.** Where there is an application for permission to mortgage, the advisability of granting the petition may involve a consideration of the conflicting rights of the life tenant and the remaindermen, and the decree authorizing the mortgage must be so drawn that the different rights of the parties are adjusted.[6]

As Between Life Tenant and Remaindermen.

§ **28.** As between life tenant and remaindermen, the question of revenue arises and ordinarily the remaindermen cannot object on the ground that the property may increase in value in the future, as that is a mere speculative possibility. It is a question of price for the remaindermen and a question of revenue for the life tenant.

Reasons Why to the Interest and Advantage.

§ **29.** There must be a reason why the sale, etc., is to the interest and advantage of the parties. It will not do to aver in the petition merely that it is to the interest and advantage of the parties in interest to make the sale or mortgage, etc. Some particular circumstances affecting the property in question must be shown, which will make it advantageous to the parties in interest for the court to act. These reasons must exist in conjunction with some of the cases specified in the act as those in which the court has jurisdiction. Thus the circumstance that the title is held by a minor will give the court jurisdiction, but there must be a reason why it is advantageous to the minor to have the title sold, etc. The fact that property is subject to contingent remainders will give the court jurisdiction on petition of the life tenant or other party in interest to order a sale, but the life tenant here again must in the petition set out reasons why the sale is advantageous to all parties in interest. In most of the cases of proceedings under the act, the application is ex parte, and perhaps in the majority of instances all parties

The petition was dismissed. It appeared that an attempt had been made on behalf of the petitioner to restrain the sale, the petition in which case had been refused before the decree confirming the sale was entered.

(6) For such a case see Stevenson's Est., 4 Super. Ct. 46 (1897), affirm. in 186 Pa. 262 (1898), reversing 17 Pa. C. C. 312, s. c. 5 D. R. 5 (1895). See § 46, post, for a statement of the case.

in interest join in the petition or have notice thereof. Where all these parties are sui juris, their wishes as to the disposition of the property are to be very highly regarded because they are practically the owners thereof.[7]

Where there is an opposition to the petition, then it becomes incumbent upon the petitioner to show by clear and satisfactory evidence that the disposition prayed for is advisable.[8] It may also be observed here, that where the application is by a life tenant and the objection is by the remaindermen, they cannot urge as a reason why the sale should not take place the fact that the property will be likely to increase in value in the near future.[9] We have included in the note a number of cases where the court has commented on the reasons for the disposition prayed for.[10]

(7) "As a rule the judgment of the owners of property as to what is most to their advantage when they are of mature age and under no disability is a safer guide than the theoretical opinions of persons no matter how skilled who have no personal interest," Penrose, J., in Miller's Est., 16 Pa. C. C. 449 (1895) at 449.

(8) Sharp's Est., 6 Phila. 153 (1866), s. c. 23 L. I. 412.

(9) In McAlpin's Est., 1 Phila. 440 (1852) an act of assembly had been passed authorizing the executors to sell certain real estate. It appeared that the property was very much dilapidated and that some of the parties interested were unable to pay their share of the costs and repairs and that the price offered was fair and reasonable. The court held that the sale could be decreed notwithstanding the objection of some of the parties in interest that the property would probably increase in value in the future. This case is material because under the terms of the act the court was the judge of the propriety of the sale, and while, therefore, it was a special act of assembly, it is similar to the jurisdiction vested under the Price Act.

(10) In the following cases the reasons indicated have been held sufficient to authorize the particular disposition prayed for:

Sales—Trustees. That the real estate, subject to a ground rent, was in a dilapidated condition and would require a large expenditure to make it tenantable, Brown's App., 68 Pa. 53 (1871). In the case of a lot of vacant ground of several acres, (1) that the price offered was a large one, (2) that the expense of maintaining the tract made it advisable to sell, as against objections of remaindermen, (1) that the testator had directed that this tract remain intact, (2) that the time would come when it would be possible to make it more valuable by buildings and other improvements, Rhoades's Est., 4 W. N. C. 527 (1877). That the property had become dilapidated, comparatively unproductive and burdensome to retain, that the price offered was better than could be obtained at public sale; petition was by executor; not clear what the trust was as words of will were not given in the report, Freker v. Berg, 193 Pa. 442 (1899).

In the case of an undivided interest in an iron ore mine, (1) that by changes in ownership the petitioners were likely to lose control of the price of ore, (2) differences in mode of doing business had greatly diminished the power of the petitioners over the mines and sale of the ore, (3) that the petitioners would soon lose a valuable control over the price of ore exercised indirectly through other furnaces, the relationship of the petitioners to which would cease upon the sale of those furnaces, (4) the prospective exhaustion of the ore banks before the coming of the remainders into possession, Brock v. Steel Co., 203 Pa. 349 (1902), at 253.

Mortgages—Trustees. That money was necessary to pay for improvements and repairs to the property, Lee's Est., 18 Phila. 2, s. c. 42 L. I. 488 (1885).

Sales—Contingent remainders to a class. That the property was unproductive, in bad repair and burdensome, and sale would inure to the benefit of the remaindermen and those having future or contingent interests therein, Loucks's Est., 203 Pa. 278 (1902), s. c. sub nom. Myers's App., 16 York 6, affirm. 15 York 181. (1) That income from the proceeds would be greater than the revenue from the property, (2) that to maintain the rental at the time of presenting the petition the whole property would have to be kept rented and the assessment remain the same, a state of affairs not likely to continue, (3) that there was a mortgage of a large amount that jeopardized the property if there should be a diminuation in rental, (4) that with the number of owners, life tenants, and remaindermen who could not protect their interest it was a serious question to have an incumbrance the size of the mortgage in question against the property if the property fluctuated and affected income, (5) that the real estate was in an inflated condition; objection by remaindermen that property would continue to advance in price was overruled, Smith's Est., 207 Pa. 604 (1904), confer McAlpin's Est., 1 Phila. 440 (1852). That the property was entirely unproductive and costing the estate an annual sum for taxes and interest on the mortgage, equitable remainders, Moorehead v. Wolff, 123 Pa. 365 (1889), s. c. 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261. Where the trust had terminated and the limitations after the life estate were contingent to children and then vested in nephews and nieces, the latter, therefore, having a vested remainder subject to be divested by the vesting of the contingent remainders, and who objected, petition being presented by the life tenant. (1) That the property was practically unproductive, (2) that the investment of the proceeds would yield a larger income to the tenant for life whose interests were more to be regarded than those of the remainderman, (3) that the price offered was not likely to be increased if the sale was deferred until the time of the falling in the remainders, when it would have to be made for the purposes of partition, (4) that the threatened enforcement of a municipal lien would expose the property to the expense of litigation and sheriff's sale, Gamble's Est., 9 D. R. 691 (1900).

Sale of an interest of a minor; that the owner of an adjoining lot was about to erect thereon a large mill or factory to be operated by steam and machinery which would greatly diminish the value of the premises, Graham's Est., 14 W. N. C. 31 (1883).

Sale of Unproductive Real Estate for Improvement and Repairs.

§ 30. It was intimated in Grenawalt's App.,[11] that part of the property might be sold to raise money for repairs, improvements to the remainder and for payment of liens, which remarks were quoted with apparent approval by Penrose, J., in Van Dusen's Est.[12]

It is clear that necessity for a payment for improvements and repairs, and the fact that the land is unproductive, are reasons why a sale is to the interest and advantage of those interested in any of the cases mentioned in the act but only when these circumstances are present. In nearly all of the cases where the court has dwelt on the advisability of the sale for improvements, repairs, and payment of liens, etc., one of the circumstances mentioned in the act was present.[13]

In Carey's Estate,[14] a petition for inquest in partition was granted because the will did not work an equitable conversion.

In the following cases the petition was refused for the reasons indicated.

Trusts—Sales. Petition by cestui que trust for decree of sale from trustees to him, (1) strong opposition to the sale, (2) conflicting evidence as to the value and propriety. Exceptions sustained to master's report in favor of the sale, Sharp's Pet., 6 Phila. 153 (1866), s. c. 23 L. I. 412.

(11) 37 Pa. 95 at 98 (1860), Thompson, J., "But taking it as presented in the auditor's report, that there were existing claims against the estate for debts 'not liens of record,' and that repairs and improvements were needed to other parts of the estate, held for the 'same uses and persons,' which required the raising of money by a sale of a portion of it for the relief and benefit of the residue (for this is the essence of the report), what ground is there to question the power of the court to order a sale? It certainly may be done for the payment of debts; so also by a fair interpretation of the act may it be done for improvement and repairs; for the act provides that money raised shall not be expended except for the payment of liens or improvements of the real estate mortgaged, or other real estate, when held for the same uses and persons.' If it may be so applied, it may be raised for the purpose of such application."

(12) 11 Pa. C. C. 201 (1892), s. c. 29 W. N. C. 573, 1 D. R. 156.

(13) e. g., Gamber's Est., 1 W. N. C. 85 (1874), contingent remainder to a class, see § 104, post. Rhoades's Est., 4 W. N. C. 527 (1877), petition by trustees to sell vacant land on the ground of expense in maintaining the tract. Petition granted on report of examiner in its favor. See Lee's Est., 18 Phila. 2 (1885), s. c. 42 L. I. 488, case of a mortgage by trustees to pay for repairs and improvements.

(14) 9 Kulp 336 (1898).

A dictum by Darte, P. J., that the courts have power to order a sale of unproductive real estate even where executors have been given power of sale, if for the best interests of the estate, may be disregarded as unsound. That real estate is unproductive may be a reason for a sale but is not ground by itself. It is not one of the circumstances mentioned in the act. Some of these circumstances must exist besides the reason.

In Kerner's Est.,[15] a life tenant petitioned for leave to sell real estate on the ground of its unproductiveness, and the petition was refused as a vested remainderman objected. This case is a square authority for the proposition that the mere unproductiveness of the real estate is not a sufficient reason for authorization of a sale.

Urgent Necessity not Required.

§ **31.** In the Trust Estate of Libbeus S. Cotton, et al,[16] a trust was created without power of sale following the early form of spendthrift trusts, where the trustee is allowed a reasonable support and the title is free from liability for his debts. On application of the trustee, the Common Pleas refused a decree of sale. The case simply turned on whether it was expedient to make the sale, and the only thing necessary to notice is that the language of the court, where they say that there must be an urgent necessity to justify the ordering of a sale, is entirely too broad. Under the terms of the deed in that case, it might possibly be that an urgent necessity to the cestui que trust should be required before it would be to his interest and advantage to sell. There is no occasion to require that the disposition of the title prayed for must be a matter of urgent necessity or even of ordinary necessity. A sale, etc., may be to the interest and advantage of those interested without being necessary.

Without Prejudice to Trust or Charity.

§ **32.** It must appear that the sale, etc., can be made without injury or prejudice to any trust, charity or purpose for which the same is held. This is a jurisdictional fact and should be averred in the petition, and set out in the decree although it may generally be gathered from the face of the title what effect the sale will

(15) 30 Pa. C. C. 175 (1904), s. c. 13 D. R. 311.
(16) 21 Pa. C. C. 451 (1899).

have on the trust. The cestui que trust must be as well off after the sale as before and receive as large an income from the property. Since the sale substitutes the purchase money for the land and does not change the title or limitations, these words must be construed to mean financial injury or prejudice. No case on this has been found.

In the case of a charity, a prejudice to the party interested may exist which would not be present in an ordinary case, as where there are special reasons for the location of the charity in a particular place. This will sometimes occur in the case of a church, schoolhouse, etc.[17] This phrase "without prejudice to any trust or charity" is included in the requirement that the disposition must be to the interest and advantage of the parties interested, really adds nothing to the act and does not appear to have received judicial construction.

In McClurg's Est.,[18] there was a sole and separate use created by will for two women. No trustee was appointed in the will and none had been appointed by the court. A petition was presented by the cestui que trust to sell the undivided interest on the grounds (1) that taxes were in excess of income (2) that this excess was likely to become greater by increased taxes and assessments for opening and grading streets, (3) that by reason of the disability of the devisees to sell, the lands were likely to be sacrificed. Upon return of the sale, it appeared that it was for a nominal consideration and the whole object of the proceeding was to vest the devisees with the title free from the trust. Confirmation was refused. The court said the colorable sale would be to the prejudice of the trust, and that without prejudice required a full value for the land.

Without Violation of Any Law Conferring an Immunity or Exemption from Alienation.

§ **33.** The act also provides that the court shall find that the sale etc., can be made without violation of any law conferring an immunity or exemption from sale or alienation.

The first observation on this clause is as to the meaning of "a law conferring" immunity. The word "law" in its common acceptance refers to some rule laid down by the legislature by

(17) See § 39, post.
(18) 22 Pitts L. J. 133 (1875).

way of statute law or by the courts by way of common law, and in no case does it seem permissible to stretch the word "law" so as to cover the prohibition against alienation or immunity from alienation imposed by a former owner of the title. This, however, has been overlooked, and it has frequently been supposed by the courts that the question is whether a prohibition of alienation imposed by an individual will prevent a sale being authorized under the act. The cases are as follows:

§ 34. In Burton's App.,[19] where there was a petition for authority to sell land, the title to which was in the ministers and vestrymen of the church, by whom the petition was presented, the charter of the church contained a clause prohibiting alienation. The court, in an opinion by Agnew, J., held that the congregation was the true owner of the property, while the corporation held but the bare legal title; that therefore the clause against alienation was a disability upon the trustee and not upon the congregation, and was, therefore, within the intent of the act as being capable of removal by the decree of the court, and did not come within the proviso as being a law conferring immunity or exemption from alienation.[20]

(19) 57 Pa. 213 (1868). "In the case of Burton's Appeal the unincorporated congregation and the incorporated officers elected by the congregation, called Trustees or Board of Council, the latter restricted from aliening the realty, could together have conveyed; for the restriction was against the church council conveying without the congregation; but it would have been unsatisfactory to the purchaser that his title should depend upon the preservation of the minutes of those two bodies, over which he could have no control." Price on The Act for the Sale of Real Estate, (1874) p. 81.

(20) "The Act of April 18th, 1853, contains apt words to embrace this case. 'Such sale, mortgaging, leasing or conveyng upon ground rent may be decreed, whenever real estate shall be held' 'for religious, beneficial and charitable societies or associations, incorporated or unincorporated,' 'and generally in all cases where estates have been or shall be devised or granted in trust, or for special or limited purposes, or where any party interested therein is under a legal disability to sell and convey the same.' The committee who framed this law say, in their report (p. 9), that the bill contains 'a general power intended to cover all cases of trust or powers, and wherever any party in interest is under any legal disability.' The property in this case is held in trust for a religious society or association, and for special or limited purposes, and the church corporation, the trustee, is under a legal disability to sell and convey. The restraint upon alienation imposed by the charter upon the church council is but a dis-

ability of the trustee and not of the congregaton, as we have seen, excepting in so far as the possession of the legal title by the council, and the want of it by the congregation, together with the number and fluctuations in its membership, operate as a practical disability on part of the body. The really effective disability lies in the church council alone. This disability falls within the terms of the law and its spirit and intent, and is therefore capable of removal by the decree of the court, unless the case comes within the language and intent of the proviso to the first section. The court 'shall have jurisdiction to decree the sale,' &c. 'Provided that the same may be done without the violation of any law which may confer an immunity or exemption from sale or alienation.'

"Unquestionably the charter is a law, and prohibits alienation by the church council, but does it confer an immunity or exemption from sale? The stress of the appellant's argument lies in this proviso, but we think it misses its true meaning. The language is, any law, not any statute. If any law, which restrains the power to sell, is a barrier to the exercise of the power of the court, the proviso nullifies the act; for it was because the law refused permission to sell to infants, lunatics, trustees and others under a legal disability to sell, that the authority was given to the courts to decree a sale. It cannot be therefore a mere want of the power of alienation, a simple disability to sell, that the proviso was intended to cover. But an immunity or exemption from sale or alienation has a meaning, and it is important to protect certain interests. Immunity or exemption from sale is not logically predicable of a person, but it is of a thing. It cannot be said of the owner that he is free from alienation, but his property may be exempt. It is therefore the real estate itself which is the subject of the proviso. It is that which possesses the immunity.

"But is this a wise distinction? To be so it must have some valuable purpose; and this is easily discovered. There are many cases where some use, purpose or trust lies at the foundation of the grant of title and where a diversion from the intent of the donor will cause the estate to revert; or where, by some act of law, by the exercise of public power, rights are acquired co-existent only with a purpose or use to which the property is devoted; and some where by contract and the sanction of a statute an estate is incapable of being divested.

"Instances may be found in grants for special and exclusive uses, as for churches, schools, hospitals, &c., and for public purposes, as railroad tracks, public streets and squares, and others, which will occur to the professional mind. Some of them can be seen in the followng cases: McKissick v. Pickle, 4 Harris 140; s.c., 9 Id. 232; Western University v. Robinson, 12 S. & R. 29; Rung v. Schoneberger, 2 Watts 25; Commonwealth v. Rush, 2 Harris 193; Commonwealth v. McDonald, 16 S. & R. 390; Commonwealth v. Alburger, 1 Whart. 469. In all such cases the immunity or exemption inheres in the title or estate itself, involving rights which would conflict with the interest decreed to be sold, and would therefore be impared by the sale. The proviso intends to protect these. But where there is no immunity from sale intended as a protection of the estate

§ **35.** In Heffner's App.,[21] where there was a petition for the sale of real estate under the act, and it appeared that the land was held under a will prohibiting a sale for a certain period, the petition was dismissed for other reasons, and the question as to the validity of the prohibition was not considered.

§ **36.** In Mercer Home, Fisher's App.,[22] there was a gift in trust with a prohibition against alienation in the will, which the court construed to be applicable to the fund left in trust for the charity and not to the title to the land, and that therefore the trustees could make a sale of the premises under the Price Act.

It is interesting to observe that in Burton's Appeal,[23] Agnew, C. J., sustained the jurisdiction upon the construction that the prohibition applied to the title held by the trustee and not to the cestui que trust,[24] whereas, in Mercer Home, Fisher's App.,[25] the court sustained the authority to confirm the sale on the ground that the prohibition applied to the fund left in trust and not to the title in the land, the implication from this latter decision being that had the prohibition applied to the title, the sale would not have been authorized.

§ **37.** In Funck's Est.,[26] the testator by his will directed that the burial ground of his family should not be sold, and devised the same to his son, Daniel, in fee, in trust for the use of a burial ground forever. It appeared that no bodies had been interred in the burial ground for a great many years, and that all the bodies had been removed therefrom, and that one of the

itself, and it is but a mere want of power in the person or party who holds it, and no independent interest would suffer by the conversion, the law intended to confer the power upon the court to order a sale." Agnew, J., in Burton's App., 57 Pa. 213 at 219-220 (1868).

(21) 119 Pa. 462 (1888), s. c. 21 W. N. C. 249.

(22) 162 Pa. 232 (1894).

(23) 57 Pa. 213 (1868).

(24) The observations of the learned judge on this point are open to objection. The church was clearly the cestui que trust, and the title was in the ministry and vestrymen, and the prohibition against alienation, therefore, could be applicable only to the church corporation in its corporate capacity, and the process of legal reasoning by which the learned judge transferred that prohibition to the legal title held by the trustees is extremely difficult to follow.

(25) 162 Pa. 232 (1894).

(26) 16 Super. Ct. 434 (1901).

heirs had filed a bill in equity to restrain the removal of the bodies, which had been dismissed. The court, therefore, held that the burial ground was lawfully tenantless after the lapse of thirty-five years. A petition was presented by Daniel for the confirmation of a private sale under the Price Act, which was affirmed. This is a very close case to a determinable fee but the court regarded it as a trust. It was contended that the clause in the will forbidding a sale prevented the sale under the act. The court said "In all cases where the immunity or exemption inheres in the title or estate itself, involving rights which would conflict with the interest decreed to be sold and would, therefore, be impaired by the sale, the protection of this proviso may be interposed with effect," but that in this case there was no such immunity and the clause did not apply, an unequivocal direction in the will being unavailing. In two recent cases the court expressly decided that a prohibition of alienation by the testator will not prevent the court authorizing the sale under the Price Act.[27]

In both these cases the will was made after the act was passed.[28] No question was raised as to this point, and it does not seem as if the law would be any different if the will were made before the Act of April 18, 1853, because the jurisdiction of the court to order the sale depends on the circumstance that the prohibition of alienation is not a law, and if it is not, it makes no difference when it was made.[29]

(27) Brock v. Steel Co., 203 Pa. 249 (1902); Grubb v. Steel Co., 203 Pa. 255 (1902). See also Rhoades's Est., 4 W. N. C. 527 (1877), where a sale by trustees under a will was ordered, notwithstanding an apparent direction to the contrary in the will; no opinion; meagre report.

(28) See § 24a, ante.

(29) In Myers' Est., 1 D. R. 140 (1892) s. c., 11 Pa. C. C. 194, 30 W. N. C. 175, testator created a trust of his residuary estate and directed that there should be no sale thereof until after the decease of certain cestui que trusts named, and authorized his trustees to sell his residuary estate in their discretion confiding the period of the sale entirely to their discretion. The petition was presented by certain of the cestui que trusts for the sale of the estate. The petition was dismissed, the court holding that they had no power to interfere with the discretion of the trustees although the language of the court might seem to imply that they had no power to order a sale until the conditions imposed had been fulfilled. The case, therefore, does not touch the question of whether the sale could have been ordered under the Price Act. In Fulton's Est., 51 Pitts. L. J. 257 (1904), there was a devise to A. and B. for life upon condition that neither should alienate,

Law as to Immunity from Alienation.

§ **38.** The later cases, therefore clearly point to the conclusion that a prohibition of alienation by a testator or donor does not confer the immunity or exception from alienation conferred by law mentioned in the act, and such a prohibition will be disregarded by the court in decreeing a sale. The grounds of decision in these earlier cases are not altogether clear. It is perfectly obvious, however, that such a prohibition is not a law, and for that reason alone not within the act. There is probably no law in Pennsylvania conferring an immunity or exemption from alienation. The doctrine of spendthrift trusts is no exception because here there is an express prohibition of alienation which is upheld as valid by law. The immunity from alienation springs from the prohibition and not from the law.

Effect of Prohibition Against Alienation as to a Church.

§ **39.** It has recently been suggested, however,[30] that a clause prohibiting alienation might be valid in the case of a church corporation when it was designed to keep the church in a certain location. It is apprehended, however, that this dictum is contrary to the spirit and purpose of the act, which is designed to promote the alienability of real estate. It has already been pointed out[31] that a court of equity had ample jurisdiction, and that jurisdiction was exercised in Pennsylvania before the passage of the Price Act, to authorize a sale of real estate held upon a charitable trust, and there is nothing in the act which indicates an intention to oust that jurisdiction.[32]

and that an attempt to alienate should work a forfeiture. The property was sold under the Price Act upon petition of one of the life tenants, and it was held upon an audit of the account of the trustee who made the sale, that there was no breach of the condition as the sale was the act of the law, and therefore the surviving life tenant was entitled to participate in the distribution of the proceeds.

(30) "Unless, therefore, it shall be clearly shown by the terms of a specific gift constituting an appreciable portion of the fund that raised the church, that a trust has been fastened upon the corporation expressly to remain forever in the particular location designated, no question of the right of removal can arise," dictum Sulzberger, J., in the court below in Phillips v. Church, 225 Pa. 62 at 63 (1909).

(31) See Foulke, Rule Against Perpetuities, etc., in Penna., (1909). § 758.

(32) See § 13, ante, as to prejudice to trust or charity. Confer Cushman v. Church, 188 Pa. 438 (1898), s. c. 14 Pa. C. C. 26 (1892), see 162 Pa. 288 (1894).

CHAPTER 3.

Disposition of or Concerning the Title Authorized by the Act.

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Preliminary.

§ 40. It is important to refer in some detail to the different dispositions of or concerning the title authorized by the act. While the same general principles already referred to apply in all these cases,[1] yet there are a number of special considerations involved in each which deserve attention. It is to be observed that the case of a sale or a conveyance on ground rent are in the interests of the free alienation of property, while the

(1) That the case is one of those specified in the act, that the disposition in question is to be the interest and advantage of those interested, not prejudicial to any trust or charity, and not in violation of any law confering an immunity or exemption from sale or alienation.

cases of a mortgage, lease and exchange are in the interest of a proper administration of the property. There is therefore a difference in the policy involved which leads to some practical distinctions.

Sale may be Public or Private.

§ **41.** The principal disposition authorized by the act is a sale, and this is the case in which the jurisdiction of the court is most frequently invoked.[2] The sale may be public or private, as the act provides that the court may order a private sale if it is of the opinion that a better price can be thereby obtained than at a public sale.[3] It should therefore appear and be so averred in the petition and set out in the decree in the case of a private sale, that the price is better than that which can be obtained at public sale. Where sale is public, the act requires full advertisement for at least twenty days by handbills posted in at least twenty of the most public places in the city or county where the premises shall be situate, and in at least two newspapers not less than three times in each.[4]

Sale Must be for an Adequate Consideration.

§ **42.** It seems hardly necessary to add that there must be an adequate consideration. In one case, where the parties cooked up a sale for one dollar in order to defeat the trust,[5] the court held that the transaction could not be authorized; that a sale of one dollar or a colorable sale, was not the sale contemplated by the provisions of the act.[6]

(2) See § 200, post.

(3) The Act of May 9, 1889, P. L. 182, authorizing private sales for the payment of debts and other purposes does not appear to affect the Price Act which in itself authorizes a private sale, consequently the amendment of June 9, 1911, P. L. 724, requiring notice of private sales, does not seem to apply to proceedings under the Act of 1853, and this conclusion is further strengthened by the provisions of the Act of June 12, 1913, P. L. 470, amending the Act of 1911, and confining its provisions to sales for the payment of debts of a decedent. As to when a private sale is better than a public sale, see Smith's Est., 188 Pa. 222 (1898).

(4) See § 18, ante.

(5) McClurg's Est., 22 Pitts. L. J. 133 (1875) stated § 32, ante.

(6) See § 211, post, on price of sale.

Distinction Between Public and Private Sales as to Discharge of Liens.

§ 43. The distinction between public and private sales is of importance in considering what liens are discharge by the sale.[7] The act provides that by such public sale the premises sold shall be discharged from all liens, and the act of March 23, 1867,[8] provides that private sales under the act shall discharge the premises sold from the lien of the debts of the decedent, excepting debt of record and debts secured by mortgage.[9]

Terms of the Sale.

§ 44. It is also provided that the sale may be partly for cash and partly on credit.[10] The usual practice is to take some form of purchase money obligation, generally a mortgage, for the amount upaid. It was frequently the practice, particularly in the country where ready money was not so available, for the orphans' court to direct a sale with provision for deferred payment of the purchase money, extended sometimes over a considerable period of time.[11]

It was provided by the Act of March 22, 1859,[12] which, however, does not apply to the City of Philadelphia, that the Orphans' Court should in authorizing sales of real estate have power to direct a sale on credit if at least one-fourth of the purchase money were paid down at the confirmation of the sale.[13]

(7) This subject is discussed in Chapter 17 on Discharge of Liens by the sale.

(8) P. L. 43, § 2.

(9) See also discussion of sale discharged from lien of debts of decedent, not of record, § 113, post.

(10) As to the title of the purchaser pending the completion of the sale, See § 229, post.

(11) In Bailey's App., 2 Grant 225, s. c. Bailey's App., 32 Pa. 40 (1859), there was an administrator's sale for the payment of debts. Order of the orphans' court provided for the payment of one-third down at confirmation, one-third in one year, and one-third in two years. Upon petition of the administrator of a judgment creditor of the decedent who had levied on the real estate, the sale was set aside and decree amended to make the purchase money payable in one year. Confer, Thompson v. Rogers, 67 Pa. 39 (1870).

(12) P. L. 207. For text of the act see Appendix A., n. 66.

(13) It seems hardly worth while to add that if the decree calls for a purchase money mortgage, the purchaser may, nevertheless make payment entirely in cash, Potts v. Wright, 82 Pa. 498 (1876), s. c. 34 L. I. 148, 24 Pitts. L. J. 125, 5 L. Times O. S. 35, 9 Lanc. Bar 14.

This act may be construed as limiting the provisions of the Price Act in counties outside of Philadelphia. In Philadelphia County the court seems to have full discretion under the terms of the Price Act in fixing terms of the sale.

General Discussion of Mortgages.

§ **45.** A mortgage is in fact an incumbrance or pledge of the legal title as security for a loan. The considerations involving the advisability of a mortgage will therefore obviously be somewhat different from those applicable in the case of a sale.[14] It is not proper, therefore, to authorize a mortgage to pay a debt contracted by the trustee which the cestui que trust does not admit to be due.[15]

The Orphans' Court may, under the act authorize an administrator c. t. a. to mortgage real estate for the purpose of paying for repairs and improvements contracted for by a testator in his lifetime, together with such additional expenditures as are necessary in order to properly complete the contracts.[16] The propriety of authorizing a mortgage in the case where there are conflicting interests of a life tenant and remainderman will often be a subject of anxious inquiry.

For a case where the trustees of a life estate were authorized by Common Pleas to mortgage on petition of the cestui que trust, see Carswell's Pet.[17] A few other cases of a mortgage are collected in the note.[18] Since the mortgage is a burden on the

(14) In the case of a proposed mortgage, the question of expediency is a broader question of fact than in the case of a sale, as where subject to the lien of debts not of record, Penrose, J., in Reilly's Est., 13 Phila. 201, 202 (1879), s. c. 36 L. I. 49.

(15) Reilly's Est., 13 Phila. 201 (1879), s. c. 36 L. I. 49. In this case the cestui que trust were minors and the claim was not yet reduced to judgment. The trustee was authorized to mortgage the trust property to pay taxes and other necessary expenses, and the mortgage included fee of counsel whose services had been for the benefit of all interested.

(16) Burton's Est., 16 Pa. C. C. 289 (1895), s. c. 4 D. R. 106.

(17) 1 Phila. 521 (1854), 12 L. I. 14. There was also a dictum in this case that as to equitable interests in remainder vested in minors, application would have to be made to the orphans' court if it was desired to unite all interests, and the decree was apparently drawn to authorize only a mortgage of the life estate.

(18) For other instances of mortgages under the act see Orwig's Est., 19 Phila. 158 (1889), s. c. 7 Pa. C. C. 71, 46 L. I. 99. All owners were sui juris

estate and only authorized after it is found to be to the interest and advantage of all concerned, it follows that the decree authorizing the mortgage must be strictly pursued. The mortgagee is put on notice of the nature of the transaction and bound to see that the mortgagor who executes the mortgage is fully authorized by the terms of the decree.[19] A mortgage when signed by the trustees as individuals is sufficiently executed when the circumstance of the transaction appears on the face of the papers.[20]

In the case of a mortgage of a trust estate, the trustee is the proper party to present the petition, although it may be presented by the cestui que trust, in which case if all the parties join the defect is overcome.[22] The mortgage, however, should be made

except one, and all united in the application including the guardian of the minor, and the land was subject to the lien of decedent's debts. Penrose, J., construed the act very broadly. In Ash's Est., 12 D. R. 72 (1902), the petiton of a trustee for leave to mortgage was apparently granted. The facts are obscurely reported and it does not appear what act the proceedings were under. In Lee's Est., 18 Phila. 2, s. c. 42 L. I. 488 (1885), a trustee was authorized to mortgage to repair and make improvements. The reference by Penrose, J., to the 6th Sec. of the act of April 13, 1854, P. L. 368, is probably erroneous as that act has no 6th Sec. and probably was meant for the 6th section of the Price Act (Act of 1853), which provides, inter alia, for the disposition of the proceeds of the mortgage, and, inter alia, that such proceeds shall not be expended except upon or the improvement of real estate, etc., except, etc. The case probably arose under the Act of 1853. In Lombaert's App., 99 Pa. 580 (1882), a trustee was authorized to execute a mortgage to raise money to make repairs to the real estate. In Anderson v. Devlin, 17 Phila. 1 (1877), s. c. 34 L. I. 115, it was not clear under what act the proceeding was had. A mortgage was executed and there was apparently a controversy over the application of the proceeds of the mortgage. In West v. Cochran, 104 Pa. 482 (1884), sub nom. West v. Cochrane, 41 L. I. 330, s. c. 31 Pitts. L. J. 373, the guardian of the minor children of a decedent was authorized to mortgage the interests of the minors in order to raise money for the payment of debts.

(19) Lawrence's & Appleton's Ests., 14 Pa. C. C. 662 (1894), s. c. 3 D. R. 356, 35 W. N. C. 406; reversed on other grounds in Lawrence's Est., 169 Pa. 185 (1895). The mortgagee, therefore, who advances more money than the amount authorized by the decree does so at his peril.

(20) Lawrence's Est., 169 Pa. 185 (1895), s. c., 14 Pa. C. C. 662 (1894), 3 D. R. 356, 35 W. N. C. 406. Query by Ashman, J., in this case in the court below whether a decree authorizing a mortgage generally would authorize a mortgage to a building association if question were raised at the time of execution.

(22) Stevenson's Est., 4 Super. Ct. 46 (1897), at 51. Carswell's Pet., 1 Phila. 521 (1854), s. c. 12 L. I. 14.

by the trustees and not by the life tenant. The same rule applies here as in all cases of mortgages by trustees, namely, that the mortgagee cannot recover on the mortgage if it appears that he knew of a misapplication of the proceeds by the trustee.[23] In Spencer v. Jennings,[24] the administrator made a mortgage under order of the court upon a petition setting forth that it was to raise money to pay debts not of record and purporting to be under the Price Act. It was held that the case was not provided for by the act, and therefore the mortgage was void and the mortgagee had no title and the heirs of the decendent could recover in ejectment.[25]

§ **46.** In Stevenson's Estate,[26] a testator had left property in trust for certain life estates with remainders over. The life tenant applied for leave to mortgage under the Price Act. The court commented on the fact that the petition should have been made by the trustee but since the trustee and all parties joined in the petition, that defect was remedied. The decree of the court below,[27] authorizing the mortgage, was reversed, the Superior Court apparently not thinking it was to the advantage of the estate that the mortgage should be made. The remarks of Smith, J., are as follows:[28]

"It will be proper to ascertain with reasonable certainty: (1) The probable duration of the life estate, (2) whether the proposed outlay becomes necessary because of the neglect of the trustee to maintain the premises in a tenantable condition, (3) whether the proposed alterations are such as the trustee should reasonably

(23) Confer Lawrence's Est., 169 Pa. 185 (1895). For a case where the court sent the proceedings back because of insufficient facts on the record, see Stevenson's Est., 186 Pa. 262 (1898).

(24) 114 Pa. 618 (1886), affirmed on reargument in 123 Pa. 184, s. c. 139 Pa. 198 (1890).

(25) Confer, Act of May 3, 1855, P. L. 415, which provides that the court of common pleas may, upon petition of the trustee and the cestui qui trust of at least a life estate, of an estate composed of real and personal property, direct the application of the personal property or a portion thereof to the improvement of the real estate in certain cases, the expenditures to be a charge on the realty and recoverable, if necessary, by a sale, as in the case of orphans' court sales.

(26) 186 Pa. 262 (1898), s. c. 4 Super. Ct. 46 (1897), 17 Pa. C. C. 312, 5 D. R. 5 (1895).

(27) 17 Pa. C. C. 312, s. c. 5 D. R. 5 (1895).

(28) 4 Super. Ct. @ 51.

make for the benefit of the life tenants, without regard to possible advantages to the remaindermen, (4) whether the improvements may not be worn out, or the changing demands of the neighborhood render them useless, before the expiration of the life estate. In either of these events the loan, if authorized, should be made on the credit of the life estate and the lien restricted to it.

"If it should be found to the interest and advantage of both the life tenants and the remaindermen to have the improvements made and the loan effected, and that the cost would be more than the life estate should bear, then the court will determine by its decree what proportion should be borne by each estate, the lien, notwithstanding, to extend to both. Ordinarily, when both estates will be benefitted by the proposed improvements, the court should consider to what extent the improvements will remain and benefit the property beyond the termination of the life estate, and this should form the basis of the charge against the remainder."

On appeal to the Supreme Court,[29] the decree of the Superior Court was affirmed, the Supreme Court being of the opinion that the record was in such a defective condition that it was impossible to ascertain what facts had developed by the decree and therefore to properly decide the case. In a case of this kind the nature of the improvements to be made by the mortgage money should be carefully examined, and any excess of income above what the life tenants might properly expect should be applied by the trustee as a sinking fund towards paying off the mortgage. The adjustment of the equities between the life tenant and remainderman, is frequently of very considerable difficulty.[30]

Mortgage Money to be Spent Only on the Land, etc.

§ **47.** It must be remembered that the Price Act specially provides in Sec. 6 that no principal monies raised by mortgage shall be expended for any other purpose than for the payment of liens upon the improvement of the real estate mortgaged or other real estate when held for the same uses and persons unless the sale be required for the maintenance or education of parties having the like interests vested or expectant and can be equally and equitably so applied and without diminution of the capital that may of right

(29) 186 Pa. 262 (1898).

(30) As to this point, see Phillips's Est., 12 D. R. 690 (1903).

become the property of parties having unbarred interests or title in remainder or by executory devises. These provisions of the act must be carefully kept in mind in applying the proceeds of such a mortgage. The money must be spent upon the real estate upon which the mortgage is an encumbrance or upon other real estate which is held under the same title. It would not be proper, for instance, to take the proceeds of the mortgage upon property held under one trust in a will and apply that to the improvement of real estate held under another trust, but the proceeds may be applied to another piece of real estate held under the same trust. In like manner, where a minor has an interest in any proceeds, it would be proper for the court to apply any part thereof to the education and maintenance of the minor. It is apprehended that this could only be done where the minor has a vested interest and the provisions of the act in this particular are merely co-extensive with the law under which the orphans' court may in all cases allow out of the estate of a minor a suitable sum for its support, maintenance and education.[31]

As to Confession of Judgment Under Order to Mortgage.

§ **47a.** There seems to be some doubt whether a decree of the orphans' court merely authorizing a mortgage confers sufficient authority to execute a warrant of attorney to confess judgment.[31a] In view of this doubt, it is probably better to insert in the decree authorizing the mortgage, a special clause authorizing and directing the execution of a warrant of attorney to confess judgment under the usual form.

Lease.

§ **48.** Although the act provides for the authorization of a lease in the cases specified, it is rarely necessary to invoke this clause of the statute and few cases have arisen. The reason is that defects in title specified[32] do not interfere with the leasing of the property except in extraordinary cases. A trustee has power, indeed it is his duty, to lease without any authority being expressly conferred. So also a guardian,[33] committee of a luna-

(31) Act March 29, 1832, P. L. 190 § 13.
(31a) See § 248, post.
(32) See table in note 18 § 13 ante.
(33) Stoughton's App., 88 Pa. 198 (1879), semble.

tic, married woman, tenant of a property subject to contingent remainders or executory devises, owner of a qualified fee, or a corporation may each make a lease notwithstanding the disability to convey or mortgage embraced or inherent in their title. Where, however, it is desired to lease for a long term of years, it may be advisable to obtain the order of the court, particularly where there is a life estate the probable duration of which will be less than the proposed term of the lease, and there are contingent remainders limited after the life estate. Although this proceeding would be found just as useful where the life estate is followed by vested remainders, apparently no provision is made for such a case. Here, of course, all parties not under disability could join in the lease. If one of the vested remaindermen is a minor, there would be sufficient ground for the jurisdiction of the court to attach as to his interest. A lease which extended beyond the duration of the life estate would, to that extent, divest the interest of the vested remaindermen, and the lessee could assert his right as against them. The court may consider a very long lease of 50 years as amounting to a sale in a case where the will requires the assent of several persons to a sale.[34]

In Stoughton's App.,[35] a guardian executed a lease of 40 acres of certain oil lands for twenty-one years without confirmation of the court. He then made another lease for twenty years to another party, which was confirmed, which second lease interfered with the first. It was held on application by the first lessees to have relief against the second lease that they had no standing, the first lease having been made without authority. It did not appear under what act the second lease was confirmed; probably under the act of 1853.

By the act of June 8, 1874,[36] supplementing the Price Act, the court may in the case of a lease of mining lands decree a combination of the same (presumably for the purpose of the lease) with other adjoining lands so as to form one tract and apportion the rent among the several owners thereof, as if they were tenants in common of the whole according to the quantum of their interests before the combination was made.

So also where a trustee proposes to make a long term improve-

(34) Freeman's Est., 181 Pa. 405 (1897). See 21 D. R. 1 (1911).
(35) 88 Pa. 198 (1879).
(36) P. L. 277, Sec. 1. For text see appendix A.

ment lease, the jurisdiction of the act should be invoked to protect all parties. In Hollins's Est.,[37] the trustee of a one-fourth undivided interest was refused leave to join in a sixty years improvement lease because of the objection to the lease by a cestui que trust who was sui juris. Penrose, J., said that such objection would almost be sufficient to defeat a sale or lease. The joinder of the other tenants is material under the act, only as of importance as furnishing persuasive evidence that the proposed disposition is to the interest of the cestui que trust. A decree of the court in these cases is perhaps more necessary for the protection of the lessee than for the protection of the lessor.

Exchange.

§ **49.** The exchange of real estate is the same as a sale except that, in the first case, land is exchanged for land, and, in the second case it is exchanged for money. The words of the act, therefore, authorizing a sale seem to cover the case of an exchange. No case has been found on this point except Miller's Est.,[38] where, however, the court refused to authorize the transaction because it was not of the opinion that it was to the interest and advantage of those interested. Most of the parties in interest opposed the exchange. Penrose, J., said that the court had power to authorize the exchange under the act of 1853 and the act of April 13, 1854,[39] permitting investment in other real estate.

Exchange means exchange of interest in land for another land, and not an exchange of interests in the same property, as in Thomas's Est.,[40] which is partition. Section 7 provides that the court may authorize trustees, committees, guardians, married women and corporations to make and take conveyances by deed acknowledged in court without public sale in order to square and adjust lines between adjoining owners.

Conveyance of or on Ground Rent.

§ **50.** A conveyance on ground rent is where the grantor secures part of the purchase money by reserving a rent out of the property conveyed to be paid by the grantee, his heirs and assigns, which rent in generally expressed to be extinguishable upon the

(37) 16 D. R. 441 (1907).
(38) 4 D. R. 328, s. c. 16 Pa. C. C. 449 (1885).
(39) P. L. 369.
(40) 11 D. R. 290 (1902).

payment of a certain capital sum which is mentioned in the conveyance. It is often extremely convenient to make settlement for a property in this way, and the act merely recognized a practice which has long been common in the State of Pennsylvania, when it empowered the courts to authorize a conveyance on ground rent. Indeed, power to authorize a conveyance of this kind seems to be implied in that part of the act providing that the sales may be partly for cash and partly for credit, and on such terms as the court shall approve. This clause, however, puts the matter beyond doubt.

Extinguishment or Sale of Ground Rent Reserved Under a Power of Sale.

§ **51.** Under the law as it stands independently of the act, there is some doubt whether an executor or trustee having a power of sale who should exercise the power by a conveyance reserving the ground rent, would have the power to convey or extinguish the rent, it being supposed that the power had been exhausted by the first conveyance.[42]

The clause in the act providing that "[every power to sell in fee simple real estate] created by deed or will shall be taken to confer an authority to sell and convey reserving a ground rent or rents in fee and the same to release and extinguish according to law and the stipulation of the deed, and also to grant and convey such ground rent or rents to any purchaser or purchasers thereof free of all trust," was obviously designed to remove this doubt and make it clear that such power of sale would authorize a subsequent extinguishment of the rent which had been reserved there-

(42) Where there is a sale on ground rent under a power of sale which does not specifically give power to extinguish the rent, the power is exhausted by the conveyance, and the executors cannot subsequently sell or extinguish the rent, Ex parte Elliott, 5 Whart. 524 (1840), semble. Gibson, C. J., pointed that the execution of the power cannot be repeated, and said that the question was whether the power was exhausted by the conveyance in question. Where the will gave the executors "full power to sell and dispose of or to let on ground rent . . . . . and make and execute sufficient deeds of conveyance in fee simple or otherwise," and the executors conveyed on ground rent with a clause of redemption, it was held that they had full power to extinguish the ground rent and receive the extinguishment money, Ex parte Huff, 2 Pa. 227 (1845). The court put the decision partly on the ground that a sale on ground rent was in effect an executory contract of sale, and that the extinguishment was merely the completion of the entire contract.

under. It is to be observed that the part of the clause enclosed in brackets was omitted from the amendment of June 14, 1897,[43] and there is therefore some doubt under the law as it stands as to what this clause means. Assuming that the clause had a meaning, that is to say as to cases arising between April 18, 1853, and June 14, 1897, when the clause stood in its original form, the further question arises as to whether under this clause it was necessary for the person having such power of sale to apply to the court in order to make the conveyance or reservation of the ground rent. There is nothing whatever to indicate that such application to the court is necessary, and the clause is so worded as to merely operate as a construction of a power, independently of any proceedings in court.

Cases to Which Act Applies.

§ **52.** When the title to the ground rent is derived under a deed or will, and there is a power of sale in fee simple, the law is clear that the ground rent may be sold or extinguished under the power. It is furthermore plain that the only person who can deal with the ground rent is the one having the legal title, and no question as to the application of the power of sale can arise unless the power of sale is conferred upon him.[43a] Where, however, the title of the ground rent is affected by any of the circumstances mentioned in the act,[43b] there is a clear necessity for resorting to the court.

A ground rent may be vested in several owners and in such case be the subject of partition. It cannot, however, be subdivided or leased, and is never, except in rare instances, conveyed on ground rent. The only cases where the court will be asked to act, there-

(43) P. L. 144.

(43a) In Church v. Williams, 5 Pa. C. C. 641 (1888), a bill in equity was filed for specific performance of the covenant to extinguish the ground rent. This case is badly reported. The bill was apparently filed by the owner of the land against the holders of the rent. The owner of the rent died devising the ground rent to his wife for life, with power of appointment as to one-half, the other one-half to his heirs at law. The life tenant was also executrix. She exercised the power of appointment and letters of administration d. b. n. c. t. a. were issued on the estate of the owner of the rent. Extinguishment requested from the heirs of the testator and the appointee of the life tenant. Demurrer on the ground that the administrator d. b. n. c. t. a. was the one to exercise. Demurrer overruled. The owner of the rent extinguishes and not the person having the power of sale.

(43b) Chap. 1, n. 18.

fore, will be the case of a sale, mortgage, extinguishment or partition. The case of a partition presents no difficulty, there being nothing in the partition of a ground rent to differentiate it from the partition of any other piece of real estate.[44] In like manner, the mortgage of a ground rent is free from difficulty, and is similar to any other mortgage.[44a] The case which is of usual occurrence and is involved in some obscurity is the case of a sale or extinguishment.[45]

As to Sale or Extinguishment of a Ground Rent Under the Act.

§ 53. The jurisdiction of the court under the act in ordering the sale or extinguishment of a ground rent is frequently invoked and there are several distinctions to be drawn. The difficult question is whether the act authorizes the court to enter a decree directing an extinguishment of the rent. It has been frequently supposed that the act does not confer jurisdiction to order an extinguishment of a ground rent, and petitions in such cases have been refused. It is apprehended that there is no solid distinction, so far as the Price Act is concerned, between an extinguishment and an assignment. The extinguishment is a sale differing from an assignment only in the form of the deed and in the circumstance that in one case the grantee is the owner of the rent, and in the other case he is not. This latter circumstance, however, seems to be utterly immaterial. The difference in the wording of the deed is made at the request of the grantee in order that it may clearly appear on the record that the ground rent is merged and thus clear his title of an encumbrance. The extinguishment of the rent depends entirely on the status and intent of the assignee of the rent, and the assignor has no voice in the matter whatsoever. Neither does the extinguishment or the assignment of the rent affect the relation of the assignor to the conveyance in any way. It seems, therefore, that the distinction between an assignment and an extinguishment is merely technical and utterly immaterial, so far as the jurisdiction under the act is concerned.

In Hirst's Estate,[46] the trustees were seized of a ground rent

(44) See § 154, post, as to partition.

(44a) See § 45, ante, as to mortgage.

(45) See Pierce's Est., 7 Phila. 475 (1869), s. c. 26 L. I. 13, s. c. sub. nom. Clothier's Pet., 3 Brews. 254. Case of a sale of an undivided interest.

(46) 147 Pa. 319 (1892).

which belonged to the testator and filed a petition in the orphans' court for a decree authorizing the extinguishment of the rent. The decree was made but was held void because of lack of notice to the committee of the cestui que trust, who was a lunatic. In this case, however, it was held that the trustees had ample power to voluntarily extinguish the rent because they could be compelled to do so under the terms of the ground rent deed, and that whatever a person under disability might be compelled to do, his representatives might do voluntarily.[46a] In Kramer's Est.,[47] the petition was apparently by the owner of the land against trustees to compel them to extinguish the ground rent, and although they submitted themselves to the decree of the court, the petition was dismissed on the ground that there was no jurisdiction under the Act of 1853, the remedy being in the Common Pleas.[48] The case is poorly reported, and it appears from an examination of the record that the ground rent had been paid off at some time in the past and there had been a failure to execute a proper deed of extinguishment. The case may be explained on the ground that no consideration would pass, and therefore not within the terms of the Price Act, which always contemplates a sale for an adequate consideration.

The distinction between a redeemable and an irredeemable

(46a) See remarks of Penrose, J., in Shepherd's Est., 8 Pa. C. C. 520 (1890) at 522.

(47) 37 Pa. C. C. 520, s. c. 19 D. R. 603.

(48) The Act of Feb. 5, 1821, P. L. 25, 7 Sm. L. 355, Sec. 1, provides that where a redeemable ground rent is vested by death of owner or in any other manner, in minors, trustees or other persons not authorized to extinguish, proceedings may be had in Supreme Court or Common Pleas by

(1) Executors or administrators of grantors of ground rent
Other owners of the ground rent
Guardians of minors
Trustees

(2) Grantee of the ground rent
Heirs or assigns of the grantee

by petition for release of the ground rent to be executed by (1). Court may order (1) to execute releases and receive principal and arrearages of interest, and may in its discretion order security. See Serrill's Pet. (C. P.) 9 D. R. 755 (1900); Calhoun's Pet. (C. P.) 3 D. R. 232 (1894). The Act of Sept. 6, 1860, P. L. (1861) 840, Sec. 1, authorizes proceedings by owners of property to pay the amount of the ground rent into court and extinguish the same where there are judgments or liens against the owners of the ground rent.

ground rent is of some importance. In the case of an irredeemable rent, the owner of the rent may accept the payment of any sum he pleases as a price for the sale or extinguishment of the rent. It therefore follows that every case of an irredeemable ground rent is similar to every other case of real estate where the owner of the land is free to sell or not, and consequently the court in considering the propriety of decreeing a sale or extinguishment of such a rent will consider the value of the property out of which it issues, because the value of the ground rent will be determined thereby. Some irredeemable ground rents may sell at a premium of one hundred per cent. or upwards and some may be worth less than par, the value in each case being determined by the value of the property out of which it issues. In every case of an irredeemable rent, therefore, the court will be under the necessity of making the same inquiry as to the propriety of the sale and the adequacy of the consideration, as in any other case of a sale of real estate.

In the case of a redeemable ground rent, however, somewhat different considerations apply. Here the owner of the rent, if sui juris and able in law to make an extinguishment, may be compelled by the owner of the land to extinguish upon receiving the capital sum mentioned in the deed reserving the rent.[48a] By reason of this circumstance, the market price of the rent will be almost equivalent to the capital sum mentioned in the deed as payable for its extinguishment. It may be in cases where the property has depreciated that the value will be considerably less than the capital sum. It will not ordinarily be worth more because the owner of the property will not pay more for it since he can always extinguish by paying the sum specified, and a third party will not usually regard it as a desirable investment to buy it at a premium.

All these considerations are important for the court to consider in entering the decree in such a case and should be borne in mind in preparing the petition and decree. In the case of the holder of the rent, the jurisdiction vested by the act seems per-

(48a) It is, therefore, important in all cases of petitions for the sale, etc., of a ground rent, to give the court full information as to whether the ground rent is redeemable or irredeemable, and that, it seems, can only be done by attaching to the petition a copy of the deed reserving the ground rent or of the material portions thereof.

fectly clear, and there is no reason why a distinction should be drawn between the case of a sale and the case of an extinguishment, it being assumed that the price is proper and it is to the interest and advantage of the parties to dispose of the ground rent. In the case of the holder of the land, the question arises whether the act authorizes an extinguishment on his petition. If the owner of the rent voluntarily joins in, some of the circumstances mentioned in the act being present, then the case seems to be the same as if the petition were originally presented by the holder of the rent. If, however, the holder of the rent objects to the extinguishment, it does not seem that the act confers any jurisdiction authorizing the court to compel an extinguishment.

Security and Form of the Decree.

§ **54.** The security obviously need only cover the proportion of the purchase money received in cash, in which case the decree would authorize a conveyance reserving a certain sum as ground rent to be extinguished upon payment of the sum fixed and order security in double the amount of the balance of the purchase money. Under this form of decree the party making the sale would have to make further application to the court when the time arrived for the extinguishment, or where it was desired to sell the ground rent, and then give further security for the balance of the purchase money equalling the capital sum of the ground rent. If preferred, however, the decree may require security in the full amount of the consideration, and then authorize a sale reserving the ground rent, and at the same time authorize an extinguishment of the same at any time in the future. One decree would cover both acts, and there would be no further necessity for making another application to the court.[49]

Square and Adjust Lines Between Adjoining Owners.

§ **55.** Trustees, guardians, committees, married women and corporations are authorized to make and take conveyances by deed acknowledged in open court without public sale in order to square and adjust lines between adjoining owners. This practically con-

(49) It does not seem to be necessary to expressly authorize an extinguishment in the case where the security ordered in the first place is sufficient to cover the whole purchase money and there is a covenant in the deed calling for extingushment upon payment of the capital sum. Kennelly's Est., 17 Phila. 99 (1884), s. c. 41 L. I. 114.

fers jurisdiction to make an exchange of real estate, and there seems to be no necessity here for security, and the act expressly provides that the deed may be made without public sale.[50]

Purchase of Real Estate.

§ **56.** The act also authorizes trustees, guardians, committees, married women and corporations to purchase other real estate when needful adjoining[52] to that already owned by any such party or useful to the business thereupon carried on or when necessary to protect any security or rent held on property exposed to judicial sale,[53] provided that no corporation shall be so authorized to purchase beyond its charter license. This clause in the act seems to be merely declaratory of the existing law, and no case has been found of the application of its provisions. It is always proper for a fiduciary to purchase real estate necessary to protect any encumbrance held on property exposed to judicial sale. The authority to purchase real estate has also been expressly conferred by the act of April 13, 1854.[54]

A corporation can always, of course, make any such purchase without any order of court, and as to that the provisions of the

(50) In Miller's Est., 4 D. R. 328 (1895), s. c. 16 Pa. C. C. 449, there was a petition for confirmation of an exchange which was refused, as there was objection by some of the parties in interest. The court seemed to regard the case as analogous to an investment authorized under the Act of April 13, 1854, P. L. 369, Sec. 2.

(52) The word "adjoining" does not appear in the text of the act but should be supplied to make sense.

(53) In Fell's Est., 14 Phila. 248, 38 L. I. 6 (1880), the executor bought property under foreclosure of a mortgage, and then presented a petition for a ratification of the sale of the same, the purchaser being doubtful about his power to convey. It was held, in an opinion by Penrose, J., that the court probably had jurisdiction under the Price Act to authorize a sale where real estate shall have been purchased, but that it was not necessary to consider the provisions of the act as the court had jurisdiction to authorize the sale as the subject matter was personal property.

(54) Section 2. P. L. 369. "That it shall and may be lawful for any trustee, committee, guardian, or other person acting in a fiduciary capacity, to invest trust moneys in ground rents, or other real estate, by leave of the proper court, under proceedings as provided in the act to which this is a supplement: Provided, That it shall be the opinion of the court, that such investment will be for the advantage of the estate, and no change be made in the course of succession by such change of investment, as regards the heirs or next of kin of the cestui que trust."

act are clearly superfluous.[55] The proviso that no such corporation shall be so authorized to purchase beyond its charter license is also superfluous because the court would have no power to make such a decree in the face of the act limiting the amount which a corporation shall hold.

Change Location of Right of Way.

§ **57.** Trustees, guardians, committees, married women and corporations may also make and take or join with owners of other undivided interests in making and taking conveyances by deed acknowledged in court and without a public sale in order to change in part or in whole the route and location of any right of way or passage extending over and upon adjoining or other lands,[56] and it is to be in the discretion of the court in such cases whether security shall be required. It does not seem necessary to require any security in any such case unless money is paid over as part of the exchange. No case has arisen under this clause.

Lay Out and Vacate Streets. Subdivide Tract.

§ **58.** The act also provides that it shall be the duty of the court, where the premises may admit of or require it, to lay out roads, streets and alleys, and to vacate such as shall not have been paid for or received into actual use by the public, if found to be inconvenient, and to make an unprofitable division of the property. The court has also authority to order the premises, if necessary, to be so sub-divided as to command the highest price and greatest rents. These clauses of the act will be rarely invoked but will no doubt be found useful and necessary, particularly in cases where it is proposed to dispose of a large tract of ground near a city. These provisions merely seem to give the court broader discretion in authorizing disposition of the property, and hardly seem to call for any further comment.

Who May Present Petition.

§ **59.** The act says "such sale, mortgaging, leasing or conveyance on ground rent may be decreed on the petition of any trustee, guardian, committee or person interested." The question, who is a party in interest, is of some importance. The fact that the petitioner is a party in interest is a jurisdictional fact

(55) See § 24, ante. See § 82, post.

(56) By the provisions of the act of April 18, 1864, P. L. 462, Sec. 1.

and must appear on the record and should be averred in the petition.[57]

It was intimated by Paxson, C. J.,[58] that where there is a devise to A. for life with contingent remainders, the executor of the testator is not the proper person to present a petition for a sale under the Price Act to bar the contingent remainders, although it is probable that this irregularity would not be serious after the final decree. It is clear that where there is a trust, the trustee is the proper person to apply,[59] and that the cestui que trust may petition for an order authorizing his trustees to mortgage.[60] Generally the petition will be presented by the party having the legal title.[61]

Who May be Appointed to Execute the Decree.

§ **60.** It seems that under Sec. 4 the decree need not be carried out by the person who presented the petition. The court has some discretion as to this, and where the petitioner is interested in the estate and the interests are undivided, it is sometimes desirable to appoint a third party to make the sale. In such case the petition for the sale or mortgage, &c., may incorporate a prayer for the appointment of a trustee to carry out the decree, and the court will at the same time as authorizing a disposition appoint a trustee to carry it out.[62]

(57) In Gumbert's App., 110 Pa. 496 (1885), the sale was set aside because, inter alia, the interest of the petitioner applying to have the sale confirmed was not set out and the interest of the paties applying to have it set aside did appear.

(58) In Westhafer v. Koons, 144 Pa. 26 (1891).

(59) See Moorhead v. Wolff, 123 Pa. 365 (1889), s. c. 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261.

(60) Carswell's Pet., 1 Phila. 521 (1854), 12 L. I. 14.

(61) See remarks of Clark, C., in Spencer v. Jennings, 123 Pa. 184 at 196, as to who may petition, and that petition must be presented by those actually interested in the land. In Corr's Estate, 29 Pa. C. C. 276 (1903), s. c. 12 D. R. 788, there was a devise to a school conducted by a church, which was held to be in easement of the church in which the title vested and by whom the petition was properly presented.

(62) For a further discusson as to who is to execute the deed in case of Orphans' Court sales, see § 234, post. In Ulrich's App., 2 Penny. 455 (1882), an administrator sold for the payment of debts, land the title of which was in the name of a third party, in trust for the decedent, and upon a bill in equity being filed in the common pleas against the third party, a decree was directed compelling him to make a conveyance to the purchaser.

CHAPTER 4.

Legal Disabilities of the Holder of the Title.

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Minority
Preliminary ..... § 63
Necessity of distinguishing proceedings under other acts ... § 64
Notes, Act of 1832, March 29, P. L. 190.
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Preliminary.

§ **62.** In this chapter we have gathered together those clauses which are designed to authorize a disposition of the title notwithstanding some legal disability on the part of the owner, or in the language of the act, of a party interested. A case may arise

where there is some defect in the title in addition to the disability of a holder thereof. In such case, of course, there will be two grounds of jurisdiction. The discussion in this chapter will relate solely to the case of legal disability. The act provides generally, in addition to the specific instances enumerated, that the court may act in any case where a party interested is under a legal disability to convey. This clause was probably introduced to cover any case which might have been inadvertently omitted. It might be that under this clause a husband with a wife who is an habitual drunkard or absent and unheard from for seven years or who has abandoned him might obtain relief, these cases not being specifically provided for in the act.[2]

Preliminary Discussion of Minority.

§ **63.** The act provides that such sale, etc., may be decreed "whenever real estate shall be held for or owned by minors." This phrase as worded seems to cover the case where the legal title is vested in the minor and the case where the land is held in trust for the minor. As, however, the case of property held in trust is fully provided for in another clause of the section, and the objects of the trust are immaterial in considering that clause,[3] so much of this provision as relates to property held in trust for a minor will be discussed under the heading of trusts, and the immediate discussion will be limited to the case of a sale, etc., of the legal title of a minor.[3a]

(2) See § 81, post.

(3) See § 134, post.

(3a) A guardian has power to make an ordinary lease so jurisdiction under the act is unnecessary except in special cases depending on the nature of the lease. See § 48, ante.

As to guardian joining in amicable partition, see § 162, post.

Sec. 7 provides that guardians may purchase other real estate needful (adjoining) to that already owned by any such party or useful to the business thereupon carried on, or when necessary to protect any security or rent held on property exposed to judicial sale. It seems that a guardian already has power to purchase real estate necessary to protect any security, &c., and that therefore in such case the provisions of the act are unnecessary. It is clear, however, that authority would be required for the guardian to purchase other real estate. It is not usual, however, for a guardian to carry on business for a minor, and since this clause seems to relate to a purchase of adjoining real estate necessary to carry on a business, it is not likely that this clause will be frequently invoked in the case of a

The interest of a minor may be (a) in the entire property, (b) undivided, and in each case may be (1) an estate in fee, (2) a life estate, (3) a remainder contingent or vested, (4) an executory devise, (5) an estate for years. The act authorizes a sale, etc., in any of these cases.[4]

It is important to accurately ascertain the exact quantum of the interest of the minor because if a mistake is made and the interest supposed to be less than it really is, no advantage of the mistake can be taken to defeat the title of the purchaser after confirmation, deed delivered and expiration of the time allowed for an appeal.[5]

Necessity of Distinguishing Proceedings Under Other Acts.

§ 64. The chief difficulty in practice under this provision arises from the fact that proceedings for the sale of a minor's interest may be had under prior acts,[6] and there is tendency to confuse the proceedings, the petition being sometimes so worded that it cannot be ascertained which act is invoked.[7] Since the jurisdiction to make the decree depends entirely on statute, it is obvious that unless the petition clearly refers to some one of the acts, that the proceedings will be null and void. As the provisions

minor's interest. By Sec. 7, it is also provided that guardians may make and take conveyances by deed acknowledged in court without public sale in order to square and adjust lines between adjoining owners. Guardians may, by the supplemental Act of April 18, 1864, P. L. 462, Sec. 1, make and take or join with owners of other undivided interests in making and taking conveyances by deed acknowledged in court and without a public sale, in order to change in part or in whole the route or location of any right of way or passage existing over and upon adjoining or other lands, the requirement of security in such cases to be in the discretion of the court.

(4) For a case of the authorization of the sale of remainder interests, see Packer's Est., 7 Phila. 473 (1869), s. c. 26 L. I. 380, 3 Brewst. 527.

(5) Gilmore v. Rodgers, 41 Pa. 120 (1861), s. c. 9 Pitts. L. J. 209, sub. nom. Gilmore v. Rogers, 19 L. I. 28.

(6) Act March 29, 1832, P. L. 190, Act June 16, 1836, P. L. 682, Act April 3, 1851, P. L. 305.

(7) E. g., see Kreimendahl v. Newhauser, 13 Super. Ct. 606 at 608 (1900). Where the peitition is under the act of March 29, 1832, P. L. 190, the addition of an avertment that the sale is to bar contingent remainders, etc., which do not exist, does not bring the case within the act of 1853. See Wagner's App., 89 Pa. 303 (1879). It was contended in this case that there was no conversion because the sale was under the act of April 18, 1853, P. L. 503, as to which see § 189, post.

of the Price Act as to the devolution of the purchase money are different from those in all the other acts, it is important to clearly fix the jurisdiction.[8]

For convenience of reference, the provisions of the several acts are set out in the note, so the reader may easily observe the distinctions between them.[9]

(8) For a discussion of the special provisions relating to the devolution of the proceeds of the sale of the interest of a minor, see § 190, post.

(9) By Act of March 29, 1832, P. L. 190 Sec. 31, the orphans' court having jurisdicton of the account of the guardian may authorize a sale or mortgage of the estate of a minor—

A. On application of the guardian setting forth
  (1) That the personal estate of the minor is insufficient
    (a) For his maintenance and education.
    (b) The improvement and repair of other parts of his real estate.
  (2) That the estate of a minor is in
    (a) Such a state of depreciation and decay or
    (b) So unproductive and expensive
  that it would be to the interest and advantage of the minor to sell it.
  (3) Orphans' court of county where real estate is situate to have same jurisdicton.

B. By Sec. 33, a guardian must—
  (1) Exhibit to the court inventory and appraisement of real and personal estate.
  (2) File full and correct statement of all real estate.
  (3) No authority to sell to be granted until the guardian shall have filed a bond with sufficient securiety to be approved by the court.
  (4) No real estate shall be disposed of contrary to the terms of any marriage settlement.
  (5) The mansion house or the most profitable part of the estate shall be reserved to the last.
  (6) The court may refer the case to an examiner.
  (7) Must give notice to minor.
  (8) Sale public now private by act of May 9, 1889, P. L. 182.
  (9) Where real estate is situate in another county, court having jurisdiction of the account of the guardian must make a preliminary order as to the necessity of the sale or mortgage.

By Act of June 16, 1836, P. L. 682, Sec. 1, Guardian may make public (may be private by Act of May 9, 1889, P. L. 182), sale of minor's real estate under order of Orphans' Court where—

  (1) The whole or any part of the real estate of any minor is in
    (a) Such a state of dilapidation and decay, or
    (b) So unproductive and expensive

(2) That it would be to the interest and benefit of the minor to make the sale

(3) Purchaser to take the same interest minor had

(4) Before sale approved, guardian to file a bond with sufficient surety to be approved by the court.

The Act of March 16, 1847, P. L. 474 provides — "§ 2. The orphans' court in and for any city and county of this commonwealth, in which vacant ground belonging to the estate of any minor may be situated, may, upon application of a guardian, setting forth that the said vacant ground is unproductive and expensive, and that it would be to the interest and benefit of such minor, that the said ground should be let on ground-rent, it shall be lawful for said orphans' court to make a decree authorizing the guardian to let the same, or any suitable part thereof, on ground-rent, and make and execute the proper and necessary deeds and conveyances therefor, reserving thereout such a yearly rent as to the said court may seem reasonable and just, to be secured in the usual manner, and making the principal or consideration-money, to become payable after the period at which the said minor shall become of full age."

By Act of April 3, 1851, P. L. 305, Orphans' Courts have power to authorize the sale of real estate within their respective counties.

(1) Upon application of guardian, the interest of a minor, when to the interest of the minor.

(2) Upon application of tenants for life upon whose estate interests of minors depend, when to the interest of the minor. Trustee to be appointed to make sale.

(3) Sec. 2 provides, upon application made, day to be appointed for hearing, of which thirty days' notice to be given to all parties in interest, legally and beneficially, to guardians of minors, and if application by the guardian to the minors themselves or their next of kin, if any residing in the county.

Sec. 3 regulates the manner of giving notice to be in the manner prescribed by § 52-53 of the Act of March 29, 1832, P. L. 190.

Sec. 4, every application to be in the form of a petition sufficiently describing the lands and the names of the persons interested. Guardian of minor to be appointed if the minor shall appear on the day of hearing by guardian, next friend, or next of kin, the appointment of the court to be void.

Sec. 5 provides, before any sale shall be confirmed, bond to be filed with two or more sureties in double the amount of the sale, to be approved by the court, and that no sale is to be void because of any misapplication of the proceeds of the sale or because of an erroneous decision by the court that the sale was to the interest of the minors or cestui que trust interested.

By the Price Act, courts may authorize a sale, mortgage, lease, conveyance on ground rent, exchange, parition, etc., of the estate of a minor—

Notice.

§ **65.** Where the minor has no guardian, a guardian must be appointed in the regular way, of which proceeding the minor or next of kin must have the usual notice.[10]

If the minor or next of kin fail to apply for a guardian, it seems that the court may appoint of its own motion on notice, otherwise the jurisdiction under the act might be defeated. Where the property is held in trust for a minor cestui que trust, necessity for the appointment of a guardian is not so apparent. Since, however, in all cases of proceedings under the act relating to a trust, notice to the cestui que trust is probably required, it seems that even here the court would require the appointment of a guardian and notice to him.[11] The guardian, however, of the minor need not give notice to anyone when petitioning for sale, etc., and notice need not be given to the minor; his guardian acts for him and receives the notice. The guardian is clearly the one to make the petition except in the case hereinafter noted, where a minor owns an undivided interest.

(1) When to the interest and advantage of the minor.
(2) When it may be done.
    (a) Without injury or prejudice to any trust, charity, or purpose for which the same is held,
    (b) Without the violation of any law which may confer an immunity or exemption from sale or alienation.
(3) The court making order need not have jurisdiction over the account of the guardian of the minor if it has jurisdiction over the land.
(4) Need not give notice to minor; notice to guardian sufficient.
(5) May be public or private sale.
(6) Proceeds of sale devolve as real estate.
(7) Guardian to file bond to be approved by the court.
(8) By public or private sale lien of debts of a decedent not of record are discharged.
(9) The title of the purchaser shall be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings by the court.

(10) Graham's Est., 14 W. N. C. 31 (1883). In this case the court made a decree that notice be given to minors over fourteen, and to next of kin of those under fourteen, to appear and apply for the appointment of a guardian, otherwise an application would be made to the court to appoint a guardian for them.

(11) See § 48, ante.

Undivided Interest of a Minor.

§ **66.** The case where it is necessary to make a sale, etc., of the undivided interest of a minor is of frequent occurrence in practice. The undivided interest may be, as we have seen, (1) in fee, (2) in remainder, contingent or vested, (3) an executory devise, (4) a term of years. The undivided interest may be disposed of by itself or the proceedings may have in view the joining in by the minor in a sale, etc., with the other undivided interests. The decree will, of course, only relate to the undivided interest, and there is no jurisdiction under the act to compel a sale by other owners who are sui juris upon petition of the minor. Their joinder must be voluntary.[12]

Necessity of Joinder in the Petition by Other Interests.

§ **67.** It is not necessary, under the act, for the owners of the other undivided interests to join in a petition. However, it is better when possible to have them do so because the joinder is strong inducement to the court to make the sale.[13] The court will frequently decline to confirm the sale unless the owners of the other interests who are sui juris have joined in the petition.

§ **68.** In Gilmore v. Rodgers,[14] there was a private sale of an undivided interest authorized where the other parties did not join in the petition.[15]

§ **70.** In Pierce's Estate,[16] a petition was presented by the guardian of a minor for the sale of his undivided interest. The reporter, in the syllabus, said the cases decided that in such case the petition should be joined in by the other parties. The petition was, in fact, so joined in but the language of the court

(12) For cases of sales of undivided interest of a minor, see Yard's Est., 15 W. N. C. 422 (1885), s. c. 17 Phila. 436, 42 L. I. 17. For a mortgage of an undivided interest to raise money to pay debts of a decedent to which the interest of the minor was subject, see West v. Cochran, 104 Pa. 482 (1884), s. c. sub. nom. West v. Cochrane, 46 L. I. 330, 31 Pitts. L. J. 373.

(13) Pierce's Case, 7 Phila. 475 (1869), s. c. 26 L. I. 13, sub. nom. Clothier's Pet., 3 Brewst. 254. In some jurisdictions all parties in interest are required to join in the petition by rule of court.

(14) 41 Pa. 120 (1861; s. c. 9 Pitts. L. J. 209, sub. nom. Gilmore v. Rogers, 19 L. I. 28.

(15) See Reed v. Palmer, 53 Pa. 379 (1866).

(16) 7 Phila. 475 (1869), s. c. 26 L. I. 13, sub. nom. Clothier's Pet., 3 Brewst. 254.

hardly warrants the statement of the reporter. Allison, P. J., adopted the statement in Gilmore v. Rodgers,[17] that the consent of those of age was persuasive evidence that the best price had been obtained and a circumstance to be considered. The court went on to say that the administrator of the decedent should join, the property being subject to the lien of debts of a decedent not of record (on this ground there was jurisdiction over the interest of the other heirs), but appeared to grant the petition without requiring the joinder of the administrator. The court made an order directing the guardian to sell the interest of the minors as guardian, and the interest of the other heirs of the decedent as their trustee. Since, however, the other heirs were apparently of age and fully competent to join in the deed themselves and receive their share of the purchase money, there seems to be some objection to such a form of decree. The practice now is to authorize the guardian to join with the other parties in interest in making the deed upon receipt of the proportionate share of the purchase money due the minor.

Proceedings by Owner of Undivided Interest Sui Juris where there is a Minor's Interest.

§ **71.** Where the owners of the other undivided interests who are sui juris are willing to sell, etc., and the minor or guardian is unwilling to join in the proposed disposition, it seems that there is no jurisdiction under the act. The court has no power in such a case to compel the minor or his guardian to join in, the only remedy being by partition proceedings.[19] These remarks only apply where the only ground of jurisdiction is the minority of the owner of the interest. Where there are grounds of jurisdiction extending over the whole title, as where all the interests are subject to the lien of debts of a decedent not of record, it seems that the court may compel the non-consenting undivided interests to join in the sale.

Sale of Undivided Interest of a Minor to Another Tenant in Common.

§ **72.** It is frequently desirable for the minor to sell his share to another tenant in common who is desirous of acquiring the whole of the property, and in such a case, where it is expedient, the court will confirm a sale of this kind.

(17) 41 Pa. 120 (1861).
(19) See § 22 ante.

In Loughery's Estate,[20] the testator provided that it was his wish,[21] that certain of his properties (mentioning them) should be purchased by some of his other children at a price agreed upon. A price was agreed upon, and some of the parties in interest being minors, the court entered a decree directing the executors and guardians to execute and deliver the necessary deeds upon security first being entered. The petition was for "sale and delivery of deeds," and does not state by whom it was presented. The case is obscurely reported but clearly authorizes the proposition that a sale will be ratified by the guardian of an undivided interest to another tenant in common.[22]

Reasons for Sale of an Undivided Interest.

§ **73.** It will always be to the interest and advantage of the minor, as well as the other parties, to sell in order to avoid partition proceedings, and in this case an averment should be added that the price realized is as much as could be realized within the time usually necessary for the completion of partition proceedings.

Guardian Appointed in One County, Land in Another.

§ **74.** Where the guardian is appointed in one county, and the land belonging to the minor lies in another county, the application under the act for leave to sell must be made to the Orphans' Court of the county where the land lies,[23] and no preliminary application need be made to the court which appointed the guardian.[24] And if in such case the application is made to the court of the county where the guardian is appointed, the petition will be refused.[25]

(20) 12 D. R. 386 (1903).

(21) The equitable conversion here was immaterial.

(22) See also Burk's Est., 15 Pa. C. C. 9, s. c. 3 D. R. 384 (1894), where a sale was confirmed after reference.

(23) Morrison v. Nellis, 115 Pa. 41 (1887), s. c. 19 W. N. C. 20, 44 L. I. 187, 34 Pitts. L. J. 274, 14 Lanc. L. R. 96.

(24) See Orwig's Est., 7 Pa. C. C. 71 (1889), s. c. 46 L. I. 99, 19 Phila. 158, case of a mortgage.

(25) Seiger's Est., 19 W. N. C. 404 (1887). Petition for decree authorizing a lease.

Under Sec. 3, it is apparently not necessary for the guardian to give security in more than one county.[26]

It is the duty of the guardian to render his account to the court in which security was entered. If security has been entered only in the court where he was appointed, and the court of the county where the land lay authorized the sale or mortgage upon certificate of security having been entered in the other county, he seems to be under no obligation to render an account in any court except that of his appointment. If, however, as sometimes happens, he gives additional security in the county where the land lies, then it seems clear that he must render an account to the court of that county before his obligation under the bond can be discharged.

In Packer's Est.,[27] the guardian of a minor appointed in Philadelphia County applied to the Court of Berks County for the sale of the interest of the minor as remainderman in land in that County and gave security there for the principal money. A successor to this guardian was appointed in Philadelphia County. The decree in Berks County was to hold the amount of the principal money during the lives of the life tenants, pay them their share of the interest, and after their death to account for the same according to law. It was held that the Orphans' Court of Philadelphia County would not make an order, on the first guardian to pay over the money in his hands to his successor appointed in Philadelphia County because he was trustee under the court in Berks County for all parties in interest and bound to account in that court.

Pierce, J., said that the person authorized under the Act of 1853 to sell the real estate does not simply sell it as executor, committee or guardian but by virtue of the appointment of the court he becomes clothed with a new trust in which he represents the interests of all parties concerned, and is to make application of the purchase money according to the trust and decree of the court under whose direction the sale was to be made.

By the Act of May 21, 1901,[28] where the land is in two or more counties, the orphans' court of either county shall have power to decree a sale or mortgage of the minor's interest for

(26) For a discussion of this point, see § 184, post.
(27) 3 Brewst. 527 (1869), 7 Phila. 473, 26 L. I. 380.
(28) P. L. 272. See Appendix A post.

the payment of debts or other purposes. Notice, where required, to be given in both counties, and certified copies of the proceedings to be filed in the orphans' court of each county, and if purchase money obligation is taken, the same to be recorded in each county. It is doubtful how far the words "other purposes" in this act refer to the cases provided for in the Price Act or whether its provisions are to be confined solely to sales for the payment of debts. It is to be observed that the jurisdiction is confined to the Orphans' Court, and in that respect at least being not coextensive with the provisions of the Price Act.

Foreign Guardian.

§ **75.** It appears that a foreign guardian may sell under the Price Act when the certificate required by the act has been produced showing that the guardian has given adequate security to the court having jurisdiction over him.[29] The certificate required by the provisions of the Act of April 21, 1856,[30] should also be filed. It is to be observed that the act upon which the decision was based provides for the removal of the property of the minor. There is some doubt, therefore, whether it is proper to construe the Price Act so as to authorize a sale by a foreign guardian. Since, however, the court has full jurisdiction over the land, and may appoint whom it pleases to make the sale, there seems to be no reason why a foreign guardian should not be authorized to sell, etc. The practice on this point is not clear, and some courts refuse to recognize the right of the foreign guardian to sell, etc.

Lunatics and Habitual Drunkards. Provisions of the Price Act.

§ **76.** The act also authorizes the sale, etc., of the land of a

(29) Goldsmith's Est., 13 Phila. 389 (1880), s. c. 37 L. I. 465.

(30) P. L. 495, as amended by Act of May 13, 1889, P. L. 190. This act provides that a foreign guardian may sue for and recover property of his non-resident ward upon satisfactory proof by certificates according to act of congress that he has given security in double the value in the domicile, the benefit of which shall only extend to citizens of any state where similar acts have been or shall be passed; thirty days' notice to resident executor, administrator or guardian to be given and the court may reject the application when they think it is not to the interest of the ward.

lunatic or habitual drunkard so duly found by inquisition.[32] The last phrase "so duly found by inquisition," etc., obviously applies to the lunatic as well as to the habitual drunkard. The petition should always be made by the committee of the lunatic who is the proper party interested,[33] and may also be made by the persons who would probably be entitled to the real estate after the death of the lunatic or habitual drunkard and by members of his family when the committee decline to proceed. The committee, however, should make the sale, sign the deed and file the bond, give the security and receive the purchase money.

It is clear that the court cannot exercise this jurisdiction until the inquisition proceedings have been duly concluded in the Common Pleas in favor of the lunacy[34] or habitual drunkenness.

The case of a trustee for a lunatic cestui que trust does not seem to come under this provision because the trustee may proceed under the clause relating to trusts without reference to the character of the cestui que trust.[34a] The property of the lunatic or habitual drunkard may also be disposed of under other acts which must be carefully distinguished.

(32) Committees of lunatics (by Sec. 7) may make and take conveyances by deed acknowledged in court without public sale in order to square and adjust lines between adjoining owners; may make and take conveyances to perfect the partition of real estate held in joint tenancy, coparcenary or in common with others; may purchase other real estate needful (adjoining) to that already owned by any such party or useful to the business thereupon carried on, or when necessary to protect any security or rent held on property exposed to judicial sale. Committees also, by supplement of April 18, 1864, P. L. 462, Sec. 1, may make and take or join with owners of other undivided interests in making and taking conveyances by deed acknowledged in court and without a public sale, in order to change in part or in whole the route and location of any right of way or passage existing over and upon adjoining or other lands, the requiring of security in such case to be in the discretion of the court.

(33) For a case of a decree authorizing a sale on ground rent, see Kennelly's Est., 17 Phila. 99 (1884), s. c. 41 L. I. 114.

(34) Application of Fidelity Trust Co., 16 Phila. 645 (1882), s. c. 40 L. I. 484.

(34a) See § 134 post. For a case of an attempted sale by trustee for a lunatic cestui que trust, see Hirst's Est., 147 Pa. 319 (1892), where the sale was held void because there was no notice to the cestui que trust or committee.

Act of 1836.

§ **77.** Under the Act of June 13, 1836,[35] land of a lunatic may be sold, by proceedings in the common pleas, for the payment of his debts, the maintenance of his family, and the education of his minor children, and it must appear on the face of the petition that notice has been given to the wife, if any, of the lunatic, and to his or her next of kin.[36] Under this act, however, the court could not decree a private sale, jurisdiction as to which is now conferred by the Act of April 27, 1903.[37] It is important to remember the provisions of the Act of 1836, because the Act of 1853 cannot be used to authorize a sale for the purposes set out in the Act of 1836.[38]

The same act also provides for the case of a lunatic vendor or vendee under articles of agreement and for specific performance in such cases. The common pleas equitable jurisdiction over lunatics is limited by statute, and must be exercised in accordance with the provisions of the act.[39]

Notice in the Case of Lunatics.

§ **78.** There is some doubt as to the notice which should be given in the case where the committee of a lunatic proceeds under

(35) P. L. 589, Secs. 22-24. This act provides that the
Court of Common Pleas may order public (now private) sale or mortgage
Of the real estate or such part of the real estate of a lunatic or habitual drunkard as the court may deem expedient,
if personal estate insufficient for his support
upon petition of the committee
to court having jurisdiction of the account.
Application supported by oath to be accompanied with
(a) Inventory of real and personal estate
(b) Statement of debts due
(c) Estimate of the annual sum probably necessary for support and maintenance of the lunantic, his family, and education of his children, if any.
Notice to be given wife or next of kin. Section 28 provides for case where land is situate in another county.

(36) Bennett v. Hayden, 145 Pa. 586 (1892); Mitchell v. Spaulding, 20 Super. C. 296 (1902).

(37) P. L. 325.

(38) Bennett v. Hayden, 145 Pa. 586 (1892).

(39) Halderman's App., 104 Pa. 251 (1883); Halderman v. Young, 107 Pa. 324 (1885).

the Price Act for the sale, etc., of a lunatic's estate. There is nothing in the act which provides for notice to the heirs of the lunatic or to his next of kin, and it seems, since the lunatic is the owner in fee, and there is therefore no one interested but himself, that there is no occasion to give notice to his heirs.

Since, however, the Act of June 13, 1836,[40] providing for the sale of the land of a lunatic especially directs that notice shall be given to the wife, if any, of the lunatic, and to his or her next of kin,[40a] the difficulty is in determining whether this provision of the Act of 1836 is to be followed in conducting proceedings under the Price Act. There is no authority upon the proposition, and it seems as if under the strict construction of the provisions of the Act of 1853 that there is no occasion whatever to give notice to the wife, if any, or the heirs of the lunatic or his next of kin. It is better practice, however, to give such notice, and the court may well require it in any case.

Property of a Weak-Minded Person.

§ **79.** Under the Act of May 28, 1907,[41] the court may authorize a guardian of a weak-minded person to sell, mortgage, lease or convey on ground rent any part or all of the real estate of the ward.[42]

(40) P. L. 589, 22-24.

(40a) The proceedings under the Act of 1836 are accordingly void if no such notice be given, Patchin v. Seward Coal Co., 226 Pa. 159 (1910).

(41) P. L. 292, amending the Act of June 19, 1901, P. L. 574, Sec. 2, which amended the Act of April 28, 1899, P. L. 112, which amended Sec. 6 of the Act of June 25, 1895, P. L. 300. The provisions of the act follow the Price Act very closely, and are given in full in the appendix. See Act of April 27, 1909. P. L. 185, providing for a case where a weak-minded person resides out of the county, following Price Act, expressed as a supplement to the Act of June 25, 1895, P. L. 300.

(42) There are several other acts of minor importance relating to lunatics, which are as follows:

Act of April 16, 1849, P. L. 663, Sec. 1, relates to confirmation by court of Common Pleas of sale of standing timber on land of a lunatic or habitual drunkard.

By the Act of June 26, 1895, P. L. 381, it is provided that in all proceedings or actions at law or in equity now pending or hereafter to be brought, where the defendant is a lunatic, the court may appoint a committee ad litem. The Act of April 11, 1866, P. L. 780, seems to provide for a sale by the Common Pleas in the case of a husband or wife of a person non compos mentis, but it is very ambiguous, so that it is diffi-

Married Women.

§ 80. Since a married woman cannot, at common law, convey her real estate without the joinder of her huband in the deed, it follows that she might be considerably embarrassed with regard to the disposition of her property when her husband is unable to join in the deed. Two cases of this kind are provided for in the act: (1) where the husband has abandoned her for two years, (2) where he has been absent and unheard of for seven years.[43]

cult to state whether it provides for the sale of the interest of the husband or wife free of the claim for dower or curtesy, or whether it provides for the sale of the interest of the lunatic husband or wife. No case on this act has been found. Act of March 28, 1879, P. L. 14, Sec. 1, provides that the wife of a lunatic may release her dower in land which has been conveyed by the committee of the lunatic under order of court. By Act of May 24, 1887, P. L. 202, the overseers of the poor of a county, township or borough may mortgage or sell or dispose of by public or private sale, the real estate of an insane pauper unmarried and without children chargeable upon them, with the consent of the Court of Quarter Sessions.

(43) Several other cases in which a married woman may convey without the joinder of her husband are provided for as follows: By Act of May 4, 1855, P. L. 430, Sec. 2, where a husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his wife or shall desert her, she shall have the rights of a feme sole trader and may therefore convey her real estate without the joinder of her husband, Wilson v. Coursin, 72 Pa. 306 (1872), and it is not necessary for her to be decreed a feme sole trader. The only effect of the absence of the decree is put upon the party claiming under her deed the burden of showing affirmatively the existence of the facts necessary to bring her within the terms of the law, Elsey v. McDaniel, 95 Pa. 472 (1880). It would be very unsafe to take such a title without the previous decree of the court declaring her a feme sole trader, as it might be subsequently impossible to prove the existence of the facts necessary to sustain the conveyance. It is probable also that the wife may make a mortgage under the provisions of this act. No decision as to this has been found. A married woman, trustee, may convey the trust estate without joinder of her husband as if she were a feme sole, see Act of April 22, 1891, P. L. 25, Sec. 1. By Act of July 9, 1897, P. L. 212, a married woman, living separate from her husband under articles of separation duly executed and recorded, in which the husband has released all interest in the real estate of his wife, may convey such real estate or any other as if she were a feme sole without the joinder of her husband. By Act of June 3, 1911, P. L. 631, a married woman may convey to her husband as if she were a feme sole trader. This act declared unconstitutional as to prior conveyances in Buchanan v. Corson, 51 Super. Ct. 558 (1912); see Howells v. Wery, 40 Pa. C. C. 586 (1913).

The petition should set forth the sale and ask for permission to convey without the joinder of her husband owing to one or other of the circumstances specified.

A married woman may, under the provision of Sec. 7, make and take conveyances by deed acknowledged in court without public sale in order to square and adjust lines between adjoining owners; may make and take conveyances to perfect the partition of real estate held in joint tenacy, coparcenary or in common with others; may purchase other real estate needful (adjoining) to that already owned by any such party or useful to the business thereupon carried on, or when necessary to protect any security or rent held on property exposed to judicial sale.

By the supplement of April 18, 1864,[44] a married woman may make and take or join with owners of other undivided interests in making and taking conveyances by deed acknowledged in court and without a public sale, in order to change in part or in whole the route and location of any right of way or passage existing over and upon adjoining or other lands. Security in such case to be required in the discretion of the court. These provisions are unnecessary when the husband can join in, or the wife may act without his joinder under any of the acts of assembly referred to. It is, of course, obvious that a wife may purchase real estate without the joinder of her husband, and so much of the act, therefore, as relates to that, is clearly unnecessary.[44a] The act does not seem to provide for the case of a woman with a lunatic husband.[45]

Married Men.

§ 81. The act provides for the case of a man whose wife is

(44) P. L. 462, Sec. 1.

(44a) See § 24, ante.

(45) The Act of May 25, 1878, P. L. 154, provides as follows: "That from and after the passage of this act, any married woman whose husband has been duly found to be a lunatic by a court of competent jurisdiction within this commonwealth, and who owns lands as her separate estate in this commonwealth, in fee simple or otherwise, may dispose of the same by deed or otherwise, or bind the same by mortgage, as fully and completely as she could if she were a feme sole, without her husband joining in or consenting to said deed or mortgage, subject nevertheless to the rights of the husband under the intestate laws of this commonwealth: Provided, That the Court of Common Pleas of the proper county may, upon the petition of the committee of the husband, authorize the sale of his rights to or interest in such real estate."

a lunatic or a minor.[45a] It is not necessary to proceed under the act in the case of a husband with a wife under age, since the Act of March 22, 1865,[45b] by which her execution and acknowledgment of a deed of his real estate is valid notwithstanding her minority. In the case of a man with a lunatic wife, there is no requirement that she should be so found by inquisition and he can petition for permission to convey without the joinder of his wife, setting forth the fact of her lunacy, and upon that being shown, the court can authorize the sale without other proceedings. Since in this case the wife is entitled to dower at common law, security should be entered for the protection of the estate of the lunatic wife, if she should survive her husband. If the husband is abandoned by his wife or she is absent and unheard of for seven years, or is a habitual drunkard, the case is not provided for and the husband would not be able to dispose of his property.[46] As any one of these misfortunes may easily happen to a married man, the act seems to be defective in so far as it does not provide for such contingencies.[46a]

(45a) The case of a married man with an insane wife is provided for by the Act of October 28, 1851, P. L. (1852) 725, Sec. 7, which reads as follows: "That when any married woman in this commonwealth hath become insane, it shall be lawful for her husband upon application to the Court of Common Pleas of the proper county to select and appoint three discreet and intelligent persons, one of whom shall be a practicing physician, who shall make an examination, personal or otherwise, of such alleged insanity, and report the facts to the court, and if the said court be fully satisfied that the said married woman is insane, and approve the said report, the same shall be filed of record in said court, and the husband shall thenceforth, upon giving good and sufficient security to the commonwealth for the faithful performance of his trust, have full power to transact all business relating to the management or disposition of his or her real and personal estate, in as full and ample a manner as he might or could do if his said wife was sane, and gave her full consent thereto."

(45b) P. L. 30.

(46) See § 62, ante.

(46a) An absent husband who is shipwrecked or by sickness or other casualty unable to maintain himself, may sell or mortgage so much of his real estate as shall be necessary to relieve him and bring him home again to his family, Act Feb. 22, 1718, 1 Sm. L. 99, Sec. 3. The act does not tell us how a shipwrecked husband, cast away, for instance, on the South Sea Islands, could mortgage or convey his Pennsylvania real estate so as to raise the money to get home.

Corporations.

§ **82.** Corporations are referred to in several places in the act apparently authorizing them to petition for a sale, etc. Where a corporation is trustee and proceeds as trustee, its character as a corporation disappears in its character as a trustee, and it is in the same position as an individual trustee. Where, however, it is not a trustee but is merely acting with respect to the corporate property, several questions arise, as follows: (1) as to the corporate capacity to convey, (2) as to defects in title unconnected with the character of the corporation, (3) holdings in excess of the amount fixed by law, (4) charitable, religious, etc., associations.

Corporation has Capacity to Convey.

§ **83.** So far as the capacity of a corporation to convey is concerned, the provisions of the act seem unnecessary because a corporation has power as a corporation to freely dispose of all its real estate unless restrained by statute or some provisions of its charter. This conclusion is further strengthened by the provision of the act in Sec. 2, that nothing in the act contained shall be taken to affect or impair any rights or powers otherwise existing in any person or corporation to sell.[47] If there is a defect in the title, then of course the corporation will proceed because of the defect, just as an individual would, and not because it is a corporation. A few of the statutes conferring corporate capacity to convey are referred to in the note.[48]

(47) See § 24, ante.

(48) Iron and other manufacturing and mining corporations may mortgage their property, Act June 11, 1867, P. L. 1372, Sec. 1. Mining companies incorporated under the Act of 1854, April 21, P. L. 437, may sell real estate by board of directors, subject to consent of a majority of the stockholders obtained at a special meeting, Act of March 27, 1865, P. L. 34, Sec. 1. Directors of mining companies incorporated under the Act of July 18, 1863, may not sell any mine or mines without the consent of a majority of the stockholders (1871) May 8, P. L. 265, Sec. 2. Real estate companies may hold, sell and convey real estate, Act April 17, 1876, P. L. 30, Sec. 10. Title companies may purchase and sell real estate, Act May 9, 1889, P. L. 159, Sec. 1, Cl. 8. Corporations now under Act of April 29, 1874, P. L. 73, Sec. 1, Cl. 4, and its supplements, have power to "hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by-laws." All corporations may mortgage real estate, Act May 21, 1889, P. L. 257, Sec. 1. Insurance companies may receive,

Corporations may, by Sec. 7, make and take conveyances by deed acknowledged in court without public sale in order to square and adjust lines between adjoining owners; may make and take conveyances to perfect the partition of real estate held in joint tenancy, coparcenary or in common with others; may purchase other real estate needful (adjoining) to that already owned by any such party or useful to the business thereupon carried on, or when necessary to protect any such security or rent held on property exposed to judicial sale. Provided, that no corporation shall be so authorized to purchase beyond its charter license.[49]

By the supplement of April 18, 1864,[50] corporations may make and take or join with owners of other undivided interests in making and taking conveyances by deed acknowledged in court and without a public sale, in order to change in part or in whole the route and location of any right of way or passage existing over and upon adjoining or other lands, security to be required in such case in the discretion of the court. These provisions seem unnecessary, as a corporation may perform any of these acts under its ordinary corporate powers.

hold and convey real estate in certain cases under Act of May 28, 1907, P. L. 296. By Act of April 15, 1891, P. L. 15, Sec. 1, amending Act of June 25, 1885, P. L. 178, which amended the Act of April 20, 1874, P. L. 110, Common Pleas may authorize public or private sale of real estate belonging to a corporation which has been dissolved upon petition of a shareholder or corporator, with notice to all parties in interest and by advertisement as the court may direct. Sale to be made by a trustee to be appointed who shall give security in double the amount of the probable value of the land. Proceeds to be distributed as the effects of the corporation and also court may decree conveyances in specific execution of a contract in manner aforesaid.

(49) A series of statutes have been passed authorizing corporations to hold property purchased at judicial sale. Each act authorizes corporations to hold real estate theretofore bought for a further period of five years, and so long as the legislature continues to pass these acts, there seems to be no occasion to resort to the court under the clause in the Price Act. The validating statutes are as follows: Act of June 10, 1911, P. L. 871, which applies only to banking companies and excepts railroad rights of way; Act of April 15, 1903, P. L. 200; Act of April 20, 1897, P. L. 28; Act of May 18, 1893, P. L. 88; Act of May 26, 1887, P. L. 274; Act of May 22, 1883, P. L. 41; Act of May 27, 1878, P. L. 96. See Act of June 15, 1911, P. L. 955.

(50) P. L. 426, Sec. 1.

Corporate Holdings in Excess of the Amount Prescribed by Law.

§ **84.** It is provided in Sec. 5, that where a corporation shall own real estate beyond that which is authorized,[51] and no proceeding to procure a forfeiture shall have been commenced, it may have a sale confirmed under the act so as to bar the right of the commonwealth to forfeiture. The petition must, however, as in the case of a petition to bar contingent remainders, set forth an explanation of the title and the purpose to defeat the right of the commonwealth to forfeiture.[52] Under this provision, a corporation of this character, able to hold real estate

(51) The Act of May 15, 1913, P. L. 214, provides "That all corporations within the Commonwealth of Pennsylvania, incorporated for purposes not for profit, under any general or special law of the Commonwealth of Pennsylvania, or which may hereafter be incorporated under the authority of the same, have, and shall have, the right to own, hold, use, and enjoy real estate, within this commonwealth, of the clear yearly rental value or income of fifty thousand dollars, any limitation contained in the charters of such corporations to the contrary notwithstanding. Section 2. All acts or parts of act inconsistent with this act are hereby repealed." This act seems to supersede as to real estate several earlier acts, for instance, the Act of July 15, 1897, P. L. 283, Sec. 2, providing that corporations not for profit should not hold real estate in excess of the clear yearly value of $20,000. By Act of April 22, 1889, P. L. 42, the clear yearly value of the real and personal estate of literary, religious, charitable or beneficial societies, congregations or corporations was fixed at $30,000. See Act of April 26, 1855, Secs. 4, 8, and 12, P. L. 328. Confer Act of Feb. 20, 1854, P. L. 90, Sec. 3, by which the court is directed in granting the charter to limit the clear, yearly income other than from real estate. See Foulke, Rule against Perpetuities in Penna., (1909) Sec. 657. The proceedings for forfeiture are under the Act of April 26, 1855, P. L. 328, Sec. 9. By the Act of June 6, 1893, P. L. 324, any religious, educational, literary, social or charitable corporation may obtain the consent of the Court of Common Pleas to an increase in the amount of their holdings. See Kortright's Est., 237 Pa. 143 (1912), s. c. 21 D. R. 248.

(52) It seems that in such a case a corporation may sell, independently of the act, but the title of the purchaser will be defeasible on proceedings by the commonwealth just as the title of the corporation was. In Leazure v. Hillegas (1821), 7 S. & R. 313, it was held that the Bank of North America, which by its charter was authorized to hold, purchase and sell lands, but were restrained by its charter as to amount, might sell by a good title land which they had purchased in excess of the amount, but that the title of the purchaser was defeasible by the commonwealth just as the title of the grantor was.

only of a limited amount, may find it desirable to proceed for the sale of the property.

Religious, Beneficial and Charitable Corporations.

§ 85. Where the title to land is vested in a religious, charitable, or beneficial corporation, it seems clear that the corporation can convey, mortgage or deal with the title as a corporation without the aid of the court as well as any other corporation.[53] An unfortunate notion seems to have obtained, however, that such a corporation cannot dispose of its title by virtue of its corporate capacity but must obtain the authority of the court by proceedings under the Price Act.[54] Traces of this notion are to be found in the books[55] and cases have arisen in practice where the parties have, under its influence, invoked the jurisdiction of the court to confirm a mortgage or sale, etc., by such a corporation,[56] although proceedings under the act seem to be unnecessary as such a corporation has a right to sell unless restrained by statute or charter,[58] or there is a prohibition of a sale by the donor.

The Act of May 1, 1907,[59] authorizing the division of charitable corporations, provides in Sec. 5, that the court (C. P.) may authorize such conveyances of property as may be necessary to carry the division into effect.

(53) See § 83, ante, as to corporations.

(54) The provisions of the act are, "that such sale, etc., may be decreed when the title is held for religious, beneficial or charitable societies or associations incorporated or unincorporated or for or by any other corporation."

(55) See remarks of Mitchell, J., in Nauman v. Wiedman, 182 Pa. 263 at 266 (1897), s. c. 40 W. N. C. 509, 37 Atl. Rep. 863, 14 Lanc. L. R. 305; Seif v. Krebs, 239 Pa. 423 (1913).

(56) In Corr's Est., 29 Pa. C. C. 276 (1903), s. c. 12 D. R. 788, there was a devise to the school of a certain church, which the court said was in ease of the church and vested the title in the church, and hence the petition was properly presented in the corporate name of the church, and a petition apparently for confirmation of a private sale, was confirmed. See Church's Pet., 1 Lack. L. N. 89 (1887), C. P., Church's Pet., 166 Pa. 42 (1895); Dictum, Cushman v. Church, 188 Pa. 438 (1898), Clayton, P. J., in the court below, at p. 445, s. c. 6 D. R. 607 (1907).

(58) Phillips v. Church, 225 Pa. 62 (1909). Sulzberger, J., in the court below, said that the church had a common law right to sell unless restrained by statute or charter.

(59) P. L. 140.

Religious, Beneficial and Charitable Associations.

§ 86. The act provides for the sale, etc., where the property is held by or for religious, beneficial and charitable associations. Where the property is held in trust for such an association, the jurisdiction of the court is conferred by the clauses relating to trusts. The only difficulty which arises is where, if such a case could arise, the title is in the association. It seems, however, that in such case the legal title cannot vest in an association.[60] If any case should arise where a conveyance has been made to such an association or an attempt been made to vest the title in them, then there would be a proper case to invoke the jurisdiction of the court. The petition then should be by the chief officers of the association duly authorized at a proper meeting of the association in accordance with the by-laws, and then if the court finds the sale to be to the interest and advantage of the parties, the officers or such persons as may be directed may make the sale and vest a good title in the purchaser.

(60) See Foulke, Rule Against Perpetuities, etc., in Penna. (1909), sec. 723.

CHAPTER 5.

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Estates Tail.

Preliminary.

§ **90.** The act provides that such sale, etc., may be made in the case of an estate tail. All estates tail are now turned into estates in fee under the provisions of the Act of April 27, 1855,[1] and it is therefore unnecessary to resort to this provision except in the cases of old estates tail, some of which are perhaps still in existence. It appears from the remarks of Mr. Price,[2] that the act was intended to furnish a method of proceeding similar to a common recovery.[3]

Not Necessary to Resort to Act to Bar an Entail.

§ **91.** The jurisdiction under the Price Act is rarely used because it is so much easier to bar the entail by a deed executed

(1) P. L. 368, sec. 1. For a more detailed discussion of this act and of the history of estates tail, see Foulke, Rule Against Perpetuities, etc., in Penna., (1909) Secs. 23, 24. No reference is made in that discussion to the provisions of the Price Act for unfettering entails. The Act of 1855 does not apply to estates tail created by the will of a testator dying before the passage of the act, but does apply to an estate created by will dated before the act, where the testator has died after the act; Reinhart v. Lantz, 37 Pa. 488 (1861). For other cases of estates tail created before the act, see Price v. Taylor, 28 Pa. 95 (1857); Morris v. Fisher, 8 D. R. 161 (1899); Kinsel v. Ramey, 87 Pa. 248 (1878); Titzell v. Cochran, 7 Sad. Cases, 15 (1887). An estate tail descends in Pennsylvania as at common law; Guthrie's App., 37 Pa. 9 (1861), apparently overruling some earlier cases to the contrary. A judicial sale of an estate tail or a decree in partition will operate as a common recovery under the Act of April 15, 1859, P. L. 670, Sec. 1. See Curtis v. Longstreth, 44 Pa. 297 (1863).

(2) Price on the Act for the Sale of Real Estate, (1874), pp. 10, 59.

(3) Act of Jan. 27, 1749-50, 1 Sm. L. 203, provides for a common recovery to bar entails. By Act of April 10, 1851, P. L. 505, Sec. 5, certain defective deeds are confirmed, and the Act of June 20, 1883, P. L. 130, Sec. 1, Provides that any person claiming under a tenant in tail by conveyance or judicial sale, may bar the entailment in like manner as the tenant in tail.

under the provisions of the Act of January 16, 1799,[4] which obviates the necessity of proceedings in court and the giving of security. Such a deed clearly bars all contingent and vested remainders limited on the estate tail, whereas it is not clear whether proceedings under the act would have the same effect where the remainders are vested.[5]

Proceedings Under Act May Not Bar Vested Remainders.

§ **92.** The remainders after an estate tail may be vested or contingent. It is clear that the proceedings under the act will destroy contingent remainders since they are expressly provided for without reference to the nature of the estate upon which they are limited.[6] There is some doubt whether the proceedings under the act destroy vested remainders limited after an estate tail. They are not expressly provided for and the act only speaks of barring destructible contingent remainders.[7]

Mr. Price seems to be of the opinion that the vested remainders would not be destroyed.[8] The question is not likely to arise, as the estate tail may be barred by the deed executed under the statute,[9] which clearly destroys the vested remainder. Since, however, a vested remainder may thus be barred by proceedings independently of the act, there seems to be no constitutional objection to making the statute provide for the destruction of vested remainders after an estate tail.

As to Purchase Money.

§ **93.** No case has been found deciding whether the purchase money substituted for the estate tail is also turned into an absolute estate and to be entirely paid over to the former tenant in tail as if he were owner in fee. Such would be the result of the

(4) 3 Smith's Laws, 338, Sec. 1. For instance of such a deed, see Eichelberger v. Barnitz, 9 Watts 447 (1840); Cochran v. Cochran, 127 Pa. 486 (1889); Boyd v. Wingate, 13 W. N. C. 56, s. c. 14 L. Bar. 205 (1883); Linn v. Alexander, 59 Pa. 43 (1868).

(5) Implied entailment barred after twenty-one years' possession by deed under Act of May 21, 1874, P. L. 221, Sec. 1.

(6) See § 97, post.

(7) Price on the Act for the Sale of Real Estate, (1874), p. 10. Query: What is the distinction between a destructible and an indestructible contingent remainder?

(8) Price on the Act for the Sale of Real Estate, (1874), p. 98.

(9) See § 91, ante.

barring of an entail under the statute. It is provided in Section 5 that such sale shall have the effect of any other proceeding or conveyance now authorized by law, and strictly conducted to a final conclusion to bar any estate tail, and in such case shall vest in the tenant in tail whether minor, femme covert or otherwise, who after such proceeding might have become entitled to the absolute fee simple, the absolute right to the purchase money, provided the petitioner shall set forth the title and the purpose of the sale.

Sec. 6 provides that the purchase money or mortgage, ground or other rent reserved shall in all respects be substituted for the real estate and applied for the use and benefit of the same persons having a future, etc., interest, except only such remainders after an entailment or contingent remainder as shall have been barred or defeated, as aforesaid.

Mr. Price[10] says that the purchase money will be discharged of the limitations in contingency when that purpose is set out in the petition and passed on by the court.

Requisites of Petition.

§ **94.** The petition should be made by the tenant in tail, and the purpose of barring the entail should be set out in the petition,[11] and be provided for in the decree of the court.[12]

Mortgage of an Estate Tail.

§ **95.** Where there is a proceeding to mortgage an estate tail, it is apprehended that the proceeding will result in giving the mortgagee an encumbrance upon a title which, for the purpose of the mortgage, would be considered a fee simple, and upon a sale under the mortgage, the purchaser would obtain a fee simple. What effect such a decree would have upon the estate tail remaining in the tenant in tail, and whether if a mortgage were paid off the title would be affected, are questions not provided for in the act, and hardly likely to arise.

Lease of an Estate Tail.

§ **96.** Where there is a lease of an estate tail, it is probable that the tenant in tail would have no occasion to resort to the

(10) Price on the Act for the Sale of Real Estate, (1874), p. 99.
(11) Price on the Act for the Sale of Real Estate, (1874), p. 100.
(12) Price, Act for the Sale of Real Estate, (1874), p. 10.

court, as he could make an ordinary lease by virtue of his authority as tenant in tail.

Preliminary Discussion of Contingent Remainders.

§ 97. Where property is subject to contingent remainders, it is practically inalienable because it is not possible to find a purchaser who will pay the market price if he takes it subject to the remainders, and it is very difficult for the party who holds subject to the contingent remainders and the purchaser to agree on a sum which will represent the interest of the life tenant, as the contingency will happen to the advantage of one or the other, and neither wants to run the risk of a detriment to himself or permit the other to reap the advantage of the contingency turning out in his favor. The learned reader is reminded at this point that contingent remainders in Pennsylvania are destroyed by the surrender merger or natural expiration before the happening of the event of the preceding particular estate,[13] upon which they depend, and also upon a common recovery suffered by the tenant of the preceding particular estate, that it is doubtful whether they are destroyed by forfeiture of the preceding estate for treason or for violation of a restriction imposed by a previous owner of the title, and that they are not destroyed by a conveyance of the preceding estate by a lease and release, by a Pennsylvania deed in the ordinary form under the Act of 1715, or by a conveyance by the cestui que trust.[14]

Provisions of the Act as to Contingent Remainders.

§ 98. The act provides that such sale, etc., may be made where property is subject to contingent remainders. This proviso was inserted in the act in order to permit the sale, etc., where property is subject to contingent remainders, and furnishes a means of bringing such property into the market and making it as salable as if there were no such remainders limited thereon. The provision is clearly designed to provide for the destruction of the contingent remainders by an ordinary conveyance made under order of the court, as prescribed in the act.

(13) Which in Pennsylvania can, except only in rare instances, be nothing but a life estate.

(14) See Foulke, Rule Against Perpetuities, etc., in Penna., (1909) Sec. 62.

The contingent remainders must really exist, and the averment in the petition if their existence will not bring the case within the clause of the act unless the facts correspond. Consequently, in Wagner's Appeal,[15] it was held, where the sale had taken place, and it turned out that there were no contingent remainders, that the act did not apply and there was a conversion of the interest of a minor. A few instances of cases of sales to bar contingent remainders are collected in the note.[16]

In Murray's Estate,[17] there was a gift of the residue in three shares, each share for a child for life with contingent remainders over. A portion of the real estate was sold after the death of one of the life tenants, and it appears that at that time the interests were undivided. If this is so, the petition was correct in stating the purpose of barring contingent remainders and executory devises because there were probably contingent remainders limited after the estates of the other life tenants, but if the sale was of a part which had been set aside and divided into a third, then there were no contingent remainders to bar, because the life tenant being dead, the remainders were all vested in his children, and the sale was therefore a sale of the interest of a minor and not a sale to bar contingent remainders.

Distinction Between Legal and Equitable Remainders.

§ **99.** The contingent remainders may be legal or equitable. If equitable, the trustee having the custody of the legal title may dispose of the same under the clauses of the act relating to trusts,[18] and in such case the circumstance that the equitable remainders are contingent seems to be immaterial. In a number of cases, however, the courts have authorized a sale by a trustee and sustained the jurisdiction exercised chiefly on the ground that the equitable remainders were contingent.[19] If the court may

(15) 89 Pa. 303 (1879).

(16) Keim's App., 125 Pa. 480 (1889). Life tenant petitioned for the order of sale and was appointed trustee to make it; see High's Est., 136 Pa. 222 (1890); Grindrod's Est., 140 Pa. 161 (1891); Brooke's Est., 214 Pa. 46 (1906), affirming 15 D. R. 137 (1905), raises a question of construction whether there were vested remaindermen who could object to the sale.

(17) 234 Pa. 520 (1912).

(18) See § 136, post.

(19) Moorehead v. Wolff, 123 Pa. 365 (1889), 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261. Confer Rhoades's Est., 4 W. N. C. 527 (1877).

authorize the sale by the trustee where the equitable remainders are vested,[20] then it seems that in the case of a trust, it is not necessary to proceed on the ground that the remainders are contingent. In this case the jurisdiction to be exercised on the ground that the property is subject to a trust.

Contingent Remainders and Ultimate Vested Remainders.

§ 100. The question arises whether in the case where there are contingent remainders followed by ultimate vested remainders the proceedings under the act will bar the vested remainders. If a vested interest cannot be divested without the consent of the owner, there seems to be room to argue that there is no distinction between a vested interest and a vested interest subject to be divested. The question has not been decided by the Supreme Court, and in one case in the lower court it was held that the act authorized a sale.

Such a remainderman has really no greater right than a contingent remainderman because his remainder is in fact contingent, although not so regarded owing to the ancient principles of the feudal law.[22]

Requisites of Petition.

§ 101. The petition asking for the exercise of this jurisdiction should set out the title, show the contingent remainders, and specify that it is the purpose of the proceeding to pass a title clear and discharged from the limitations.[23] If the petition fails to properly set out the object of the proceedings, there is some doubt whether the purchaser, who has in good faith ac-

(20) See § 136, post.

(21) In Gamble's Est., 9 D. R. 691 (1900), there were ultimate vested remainders which were said to be defeasible as liable to be divested by the falling in of the contingent remainders, and the sale was nevertheless ordered notwithstanding the objection of the ultimate vested remaindermen. The petition was by the life tenant.

(22) See Foulke, Rule Against Perpetuities, etc., in Penna., (1909), Sec. 39, et. seq.

(23) McCaffrey v. Gibney, 223 Pa. 368 (1909). No executory devise here although the court seemed to think so. See Dict. Strong, J., in Smith v. Townsend, 32 Pa. 434 at 442 (1859); Westhafer v. Koons, 144 Pa. 26 (1891). As to what is a proper averment, see remarks of Mestrezat, J., in Swift v. Harbison-Walker R. C., 228 Pa. 584 (1910) at 587.

cepted the title under the decree of the sale and paid the purchase money, will be protected.[24]

Notice.

§ **102.** Where the sale is made for the purpose of divesting contingent remainders, a distinction should be made between the two kinds of contingent remainders so far as the question of notice is concerned, (1) those where the remainder is limited to an ascertained person subject to a condition precedent, (2) those where the remainder is limited to an unascertained person. Where the remainderman is ascertainable he must be notified, otherwise his title will not be divested by the proceedings. It seems that in such a case he cannot attack the decree, but is relegated to an action of ejectment against the land.[25] Where the remainderman cannot be ascertained, a trustee should be appointed to represent him.[26]

Preliminary Definition of Remainders to a Class.

§ **103.** Where there is a remainder to a class of persons, as children, etc., which class is likely to increase, and there is one member of the class in existence, there is in that member a vested interest the value of which is uncertain until all the members of the class are ascertained. The common, although somewhat inaccurate phrase applied to such a state of affairs is, that there is a vested remainder liable to open and let in after-born children. These remainders lie midway between vested and contingent remainders, but within the evil of contingent remainders because the property is inalienable so long as there is any possibility of an increase in the membership of the class, and the contingent remainder to children, will exist in the eye of the law even though the mother is past the age of child-bearing.[27]

(24) In Westhafer v. Koons, 144 Pa. 26 (1891), it was held that the purchaser at the sale could refuse to take the title. See § 220, post, on Orphans' Court sales.

(25) Grindrod's Est., 140 Pa. 161 (1891).

(26) See the remarks of Swartz, P. J., in the court below in Grindrod's Est., 140 Pa. 161 at 164 (1891). Trustee of contingent equitable remainders in possee to a class appointed in Moorehead v. Wolf, 123 Pa. 365 (1889), 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261, and in McCaffrey v. Gibney, 223 Pa. 368 (1909).

(27) Westhafer v. Koons, 144 Pa. 26 (1891).

Formerly Supposed that the Act Provided for Remainders to a Class.

§ **104.** It was for a long time apparently supposed that the provision in the act nevertheless covered the case, and in several instances sales to bar such remainders were authorized.[28] Mr. Price[29] was of the opinion that the case of a remainder to a class was provided for by the act as a devise or grant for special or limited purposes.

Price Act Did Not Provide for Remainders to a Class.

§ **105.** When the question came before the Supreme Court, in the case of Keller v. Lees,[30] the court said that the remainder became vested as soon as a child was born, and therefore the case was not within the act. If, however, the interest of one child was vested, that was enough, under the law as it then stood, to prevent the sale. The other remainders could not be divested and the one remain, because it could not be determined until the termination of the life estate, what the share of each in the land would be. It is suggested that this was the proper ground for the decision.[31]

Acts of 1897 Providing for Remainders to a Class.

§ **106.** In consequence of this decision, the Act of June 14, 1897,[32] amending the Price Act, and the Act of June 15, 1897,[33]

(28) See Westhafer v. Koons, 144 Pa. 26 (1891); Fox's Est., 18 Pa. C. C. 114 (1896), s. c. 2 Lacka. Law Notes, 292; sub nom. Greenwalt's Est., 5 D. R. 314, 2 Dauphin Co. 358; in this case the court, Simonton, P. J., indulged in an elaborate discussion of the nature of a remainder to a class, and concluded that it was in fact contingent. The remaindermen were all minors which might alone have justified the sale. "We also think that . . . the court would have jurisdiction to order the sale prayed for under the clause which provides that such sale may be ordered in all cases where estates have been or shall be devised or granted for special or limited purposes." Gamber's Est., 1 W. N. C. 85 (1874); the petition was by the life tenant, and the question was not discussed, the decision being placed on the ground of necessity to sell to pay for municipal improvements, as to which see § 30 ante. Moorehead v. Wolf, 123 Pa. 365 (1889), s. c. 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261.

(29) Price on The Act for the Sale of Real Estate, (1874) p. 108.

(30) 176 Pa. 402 (1896).

(31) See Crawford v. Forest Oil Co., 208 Pa. 5 (1904).

(32) P. L. 144, Sec. 1, which provides for the sale, etc., whenever property is subject to vested remainders which are liable to open and let in after-born children.

(33) P. L. 159, which authorizes the sale, etc., of lands which have

were passed authorizing a sale, etc., in the case where there is a remainder to a class. The Act of June 14th expressly amends the Price Act and limits the jurisdiction to the case of remainders to children. The Act of June 15th is an independent act following the phrases of the Price Act and confers the jurisdiction only on the Orphans' Court. It is therefore possible to proceed in the Common Pleas in a proper case where there is a limitation to children but in all other cases of a remainder to a class the proceedings must be in the Orphans' Court, otherwise the remainder cannot be barred. Each act confirms all sales theretofore made in the case specified. The Act of June 15th very curiously enough ratifies sales therefore made in both the Common Pleas and Orphans' Court. It is to be observed, however, that if in any case no member of the class is born, the remainder is entirely contingent, and a sale will be proper under the Act of 1853 as it stood before the amendment.[34]

been or shall be devised or granted for life or the life of another and with remainder limited to a class of persons some or all of whom may not be in being at the time of the decree. For text of the act see appendix A.

(34) In the following cases a sale was authorized to bar remainders to a class: Smith's Est., 207 Pa. 604 (1904), where there was a petition by life tenants of 10-12th of the property and some of the remaindermen in esse, which was resisted by tenant for life of two-twelfths and the other remaindermen. Sale was decreed. The contingent remainders were to children or grandchildren. In Loucks's Est., 203 Pa. 278 (1902). there was a petition by the life tenant, remainder to children, sale decreed. In Hinkson v. Lees, 181 Pa. 225 (1897), the testator by will dated 1841 devised to A. for life, and after his death to his lawful children and their heirs and assigns subject to a certain annuity, but if A. should die without leaving lawful issue to survive or such issue who shall not attain the age of twenty-one years, then to the lawful children of B. subject to his life, and if they survive him and live to the age of twenty-one years, or their lawful issue, to hold the same to them, their heirs and assigns, but if B. should die without leaving lawful issue, as aforesaid, then to the children of C. in equal shares, their heirs and assigns. The land embraced in the devise was sold under the Price Act by X. as trustee to bar any contingent remainders or executory devises, and the controversy arose over the distribution of the fund. It was held that the children of A., when born, took a vested remainder liable to be divested, and the children of B. took nothing until the happening of the contingency, and when that failed, their interest entirely dropped out.

Equitable Remainders to a Class.

§ **107.** Where there are equitable remainders to a class, the doubt as to the jurisdiction under the act does not exist because a trustee may be authorized to sell under the clauses of the act relating to trusts even if there are vested equitable remainders.[35]

As to the Discharge of the Purchase Money from the Contingent Remainders.

§ **108.** It is doubtful whether the proceedings under the act discharge the purchase money from the grasp of the contingent remainders.[36]

(35) See § 136 post. See Owens' Pet., 3 D. R. 328 (1894), which was a case of a sale by a trustee where there were vested equitable remainders.

(36) The act provides, Section 5, " . . . and every such sale and every conveyance in fee simple upon ground rent, shall have all the effect of any other proceeding or conveyance now authorized by law and strictly conducted to a final conclusion, to bar any estate tail, and to defeat contingent remainders, and in such case shall vest in the tenant in tail, or particular tenant, whether minor, feme covert or otherwise, who after such proceeding or conveyance might have become entitled to the absolute fee simple title, the absolute right to the purchase money, and the ground rents reserved, and such sales and conveyances on ground rent shall also bar any right of the commonwealth to forfeit real estate that may have been held by or for any corporation beyond what has been authorized, if no proceeding to procure a forteiture shall have been commenced before petition filed for a sale or letting on ground rent; Provided, that the petition shall set forth an explanation of the title, and of the purpose to bar the entail defeat the contingent remainder or the right of the commonwealth to have inquisition for any estate defeasible as aforesaid; And provided, That the purchase money or rent reserved shall be a lien on the premises sold or let, until fully paid according to the decree of the court."

Section 6. That the purchase money, or mortgage money, ground or other rent reserved, shall in all respects be substituted for the real estate sold, mortgaged, or let, as regards the enjoyment and ownership thereof, after the payment of liens, and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest, present or future, vested, contingent, or executory, as the real estate sold, mortgaged, or let, had been held, except only such remainders, after an entailment or contingent remainders, as shall have been barred or defeated as aforesaid, and those entitled to a present interest in such real estate, shall receive the interest of the proceeds or rents thereof, unless expressly directed to accumulate: Provided, That no principle monies raised by sale or mortgage, as aforesaid, shall be expended for any other purpose than for the payment of liens upon or the improve-

It is perfectly clear and well-settled that the sale under the act when properly conducted discharges the title in the hands of the purchaser from the contingent remainders. It remains to consider whether the purchase money which is substituted for the land is, in like manner, freed from the grasp of the contingent remainders. The question is important because if the contingent remainders are destroyed as to the purchase money, the life tenant of the preceding estate, where there are no ulterior vested interests, will have his estate enlarged into a fee by the operation of the sale, whereas if the contingent remainders are not destroyed, he will be in the same position as he was in before the sale, so far as the quantum of his interest is concerned. The question does not appear to have been decided by the Supreme Court, and in view of the large interests which no doubt have frequently been at stake, it is somewhat surprising that no controversy has arisen. We must distinguish in the discussion between legal remainders and equitable remainders.

Legal Remainders.

§ **109.** We have seen that in the case of an executory devise, the title of the executory devisee is not destroyed by the sale under the act, probably because before the act was passed his interest was indestructible by any act of the tenant in fee without his consent, and the act makes no provision for destroying it. In the case of a contingent remainder, the law, before the act was passed, was different. A common recovery completely destroyed the contingent remainders so that the right of the contingent remainderman was lost forever, and the tenant of the preceding estate had his interest enlarged to a fee. There therefore was, and probably still is, a way open by which the tenant of the preceding particular estate can destroy the remainders and give himself a fee.

Mr. Price[37] says that, as he understands the act, it is not to

ment of the same real estate when mortgaged, or other real estate when held for the same uses and persons, unless the same be required for the maintenance or education of parties having the like interests vested or expectant, and can be equally and equitably so applied, and without diminution of the capital that may of right become the property of parties having unbarred interests or title in remainder, or by executory devise.

(37) Price on the Act for the Sale of Real Estate, (1874), p. 10.

be used merely for the purpose of enabling the owner of the particular estate or defeasible title to get one for himself in fee, as was the practice under a common recovery, but to give the purchaser a fee simple title and security for those in remainder, except as to those who could consume the fee of right, and that estates tail and destructible contingent remainders may be barred if such purpose be explained in the petition and be sanctioned by the court without accountability for the price to those in remainder.

Mr. Price further[38] points out that the Act of 1853 has the effect of a common recovery upon the title, but does not, like a common recovery, forfeit any estate but saves the interests in remainder. He further says[39] that the question whether the purchase money will be discharged of the limitations in contingency will depend upon whether that purpose is clearly set forth in the petition passed upon by the court. And[40] that unless the particular tenant shall consent to do justice to those in remainder or having executory interests, the court will not decree a sale.

It seems, therefore, that Mr. Price had not formed a very definite opinion as to whether the contingent remainders were utterly destroyed or not by the proceedings under the act. The language of the act, however, seems to provide that when the contingent remainders are barred and defeated as to the title, they are barred and defeated as to the purchase money also. This question was expressly raised in High's Estate,[41] but not decided, the fund represented by the sale having been distributed and passed out of the power of the court and the decision going off on other grounds. Cases have arisen where real estate was sold under the Price Act to bar contingent remainders, and the fund was distributed as if the remainders had not been discharged.[42]

There are also some remarks to be found in the books which seem to countenance the view that the remainders are not in any peril by the proceedings under the act.[43]

(38) Price on The Act for the Sale of Real Estate, (1874) p. 100.

(39) Price on The Act for the Sale of Real Estate, (1874) p. 99.

(40) Price on The Act for the Sale of Real Estate, (1874), pp. 102, 103.

(41) 136 Pa. 222, see p. 234 (1890). See Keim's App., 125 Pa. 480 (1889).

(42) Hinkson v. Lees, 181 Pa. 225 (1897).

(43) See the remarks of Green, J., in Moorehead v. Wolff, 123 Pa. 365 at 373 (1888), s. c. 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261. "There

We have noticed all there is to be found in the books on the subject, and it will therefore clearly appear that no statement can be made as to the law. The chief argument on the question arises on the constitutionality of the act. It seems to be essential, in order that the act shall come within the provisions of the constitution, that the purchase money be substituted for the land, and those having an interest in the land before the sale shall have the same interest in the purchase money after the sale.

In answer to this argument, it may be said that a contingent remainder was barrable by a common recovery before the act was passed, the constitutionality of which has never been doubted because it existed as a well defined proceeding for centuries before the constitution was ever adopted. There is a broad distinction, therefore, on this ground, between the case of a contingent remainder and the case of other interests in the land, and the Supreme Court might well decide that the provisions of the Price Act would authorize the court, when the purpose was set forth in the petition, to enter an order not only destroying the contingent remainders so far as the land was concerned, but also barring them from any interest in the fund. Since, however, they must be notified, the chances are that objection would be made on their behalf, and the court could then very properly, if the circumstances of the case warranted such a proceeding, make an order paying a portion of the purchase money to the contingent remainderman, and giving the balance to the tenant of the preceding particular estate absolutely; thus, in effect, forcing a compromise between the parties as to the distribution of the fund. Such a compromise would be difficult to calculate, and it is quite likely that if faced with such an order, in a majority if the cases the parties would be content to let matters take their natural course and have the purchase money await the happening of the event specified.

are certain contingent remainders created by the will the mere existence of which would prevent any sale of the property for an adequate price unless they can be defeated by the order of the Orphans' Court; but as the sixth section of the Act of 1853 provides that the purchase money shall be substituted for the land and protects all interests in the land, these remainders are in no peril, but can be amply secured by orders respecting the purchase money." See Murray's Est., 234 Pa. 520 (1912), Mestrezat, J., at p. 523.

Section 2 of the Act of June 15, 1897,[44] expressly provides that the purchase money shall be held for the use and benefit of the same persons and estates, vested, contingent or executory, as the land sold, etc., had been held. It is therefore clear at least that in the case of proceedings under this act in the case of a remainder to a class, the purchase money is not discharged from the contingent remainders.

Discharge of Purchase Money from Equitable Contingent Remainders.

§ 110. Where there are equitable contingent remainders, the question does not arise, because the trustee will hold the proceeds just as he did the land upon the same trusts. There was no way before the act was passed, under the law, to divest such remainders from the trust fund although they might have been divested from the land where the sale by the trustee was approved by the chancellor.

Mortgage of Property Subject to Contingent Remainders.

§ 111. Property subject to contingent remainders may be mortgaged as well as sold by proceedings under the act. The effect of the decree will be to give the mortgagee a title free of the contingent remainders and the purchaser at the sheriff's sale held under proceedings on the mortgage will take a similar title. When the mortgage is paid off, the title of the mortgagee free of contingent remainders, will disappear, and the title in the mortgagor will be in the same condition that it was in before the mortgage was authorized, and the contingent remainders will remain in full force and effect.

Executory Devise.

§ 112. An executory devise is of very frequent occurrence, but the jurisdiction vested by the act in this case, to authorize the sale, etc., of property which is subject to an executory devise, is rarely invoked. Since an executory devise can, properly speaking, be created only by will, the jurisdiction will in this case be entirely in the Orphans' Court. This distinction, however, has probably been lost sight of in Pennsylvania, and cases will no doubt occur where the Common Pleas will take jurisdiction in the case. The petition should be presented by the owner of the

(44) P. L. 159.

fee which is subject to the executory devise, and set out the purpose of barring the executory devise, and if the executory devisee is in being and ascertained he should be notified of the proceedings.[45]

The sale may be made by the owner of the fee which is subject to the executory devise, or the court may appoint a third party. Security should be given to secure the interest of the executory devisee. This is necessary because executory devises retain their grasp on the purchase money as there was no power before the passage of the act in the owner of the fee to destroy or bar them as there was in the similar case of a contingent remainder.[46]

Mr. Price[47] says that before the act, executory devises and interests were not alienable or barrable, and the query arises, in view of this remark, whether the act is intended to make the executory devise alienable. It seems clear, however, that executory devises were alienable,[48] and there is, therefore, no occasion to resort to the act in such a case. Where an executory devise was limited after an estate tail, it was destructible by a common recovery or by the process which took the place of that action in Pennsylvania.[49] In such case, therefore, where there is a sale under the act, there is room to argue that the executory devise

(45) In the following cases, the estate was subject to an executory devise and ordered sold: Greenawalt's App., 37 Pa. 95 (1860), see Greenawalt v. Greenawalt, 71 Pa. 483 (1872), where the petition was by owner of the fee, executory devisee objecting. In Moore's Estate, 9 Phila. 326 (1873), s. c. 30 L. I. 176, where the minor had an estate in fee subject to an executory devise, and upon application of the executory devisee, an order of sale which had been issued on petition of the guardian was revoked, the court said: "It is enough to say that it would be unwise to sell the real estate of a minor in a case where a serious question of title may be raised. It might deter bidders and result in a sacrifice of the property. We think there is such doubt as to this title and therefore revoke the order of the sale." It was not clear what act the petition was presented under. If under the Act of 1853, the sale would have been proper. The court did not consider this point apparently, it being assumed that the interest of the minor was contingent upon his arrival at the age of twenty-one years. This erroneous view of the limitation probably led to the error in the decision.

(46) Price on The Act for the Sale of Real Estate, (1874) p. 9.

(47) Price, The Act for the Sale of Real Estate, (1874) p. 9.

(48) Foulke, Rule Against Perpetuities in Penna., (1909) Sec. 79.

(49) Foulke, Rule Against Perpetuities in Penna., (1909) Sec. 79, n. 6.

is destroyed and the proceeds of the sale belong absolutely to the owner of the estate tail. This question, however, will only arise in the case of an old estate tail, as under the Act of April 27, 1855,[50] all estates tail are turned into estates in fee.

Preliminary Discussion of Lien of Debts not of Record.

§ 113. Under the statutes making the land of a decedent liable for his debts, it was frequently difficult for his heirs or devisees or anyone else interested in the land to find a purchaser, and this difficulty was, at the time the act was passed, of a greater practical inconvenience than at present, as at that time the lien was for five years,[52] whereas it is now only for two.[53] This provision was designed to furnish a means whereby the owner could convey the land clear of the lien of the debts.[54]

(50) P. L. 368, Sec. 1.

(52) Act of February 24, 1834, P. L. 70, sec. 24. By Sec. 42 provides that: Real estate of a decedent sold by executor or administrator under order of Orphans' Court in proceedings in partition shall not be liable in the hands of the purchaser to the debts of the decedent where the sale is made after the expiration of two years from the granting of letters. Where sale is within two years, lien of debt is not discharged, Wilson's App., 45 Pa. 435 (1863); Bricker's Est., 22 Super. Ct. 12 (1903).

(53) Act June 8, 1893, P. L. 392.

(54) To meet the difficulty, (lien of decedent's debts) we have statutory remedies provided of late years. The Act of April 18, 1853, enumerated as one of the occasions for authorizing a sale by the court, "where a decedent's estate is subject to the lien of debts not of record." Not long after the passage of this act the question arose whether a private sale ordered by the court would discharge the lien of the debts. The grounds for the doubt were, first, that it was contrary to the analogies of the legislation of this State, to destroy the rights of creditors by a judicial sale without notice to them at least by advertisement; and second, the language of the act itself, which provided that "by every public sale, all liens should be discharged." In order to remove this doubt, an act was passed in 1867 which expressly authorized this result in a private sale. This has been much opposed, and at a previous session, a bill to the same effect had been vetoed by the Governor under the advice of the then Attorney General, Mr. Meredith. It certainly exposes the rights of creditors to great risk, and even if the provision as to security is carefully enforced by the court, yet the facility which it offers for sham sales at an undervalue for the benefit of those interested in the estate, cannot be overlooked. It is clear that no such sale should ever be allowed, unless the executor or administrator is made a party as the representative of creditors. Indeed under the terms of the act, which require notice to all persons having any present or expectant interest in the property this

Provisions of the Act.

§ **114.** The act provides that the sale, etc., may be authorized "whenever a decedent's real estate is subject to the lien of debts not of record."[55] As pointed out by Penrose, J.,[56] the jurisdiction to authorize a sale free of the lien of the debts of a decedent is in the interests of free alienation, and in such a case the courts should not be astute to find reasons for refusing to relieve the owners from the difficulty.[57]

Act of 1832 Distinguished.

§ **115.** This clause of the act has given some difficulty because the Act of March 29, 1832,[58] authorizes a sale for the payment of debts in the manner and under the circumstances therein specified, and the profession seems, strangely enough, to find some difficulty in distinguishing between the two acts. The distinction is clear. Under the Act of 1832, the sale is for the payment of debts, and it must, therefore, be shown that there are debts to pay. Under the Act of 1853, the sale is merely to relieve from the lien of debts actual or possible, and it makes no difference, therefore, whether there are any debts in point of fact or not.[59] The motion, however, that the Act of 1853 authorizes a sale for the payment of debts took a firm hold on the professional mind, and seems hard to kill.[60] The difficulty has been that the pro-

seems absolutely necessary to the validity of the sale, even if we do not go further and say that direct notice to the creditors by advertisement is also requisite. Henry Wharton, Lien of Decedent's Debts in Penna., 6 W. N. C. 545 at 549 (1879).

(55) For a criticism of the use of the word "decedent," see remarks of Henry Wharton, 6 W. N. C. 545 (1879). Whatever error there is in the meaning of this word or its pronunciation, usage has made it impossible to get rid of the error.

(56) In Orwig's Est., 19 Phila. 158, 46 L. I. 99 (1889), 7 Pa. C. C. 71.

(57) Jermon v. Lyon, 81 Pa. 107 (1876).

(58) P. L. 190.

(59) In Green's Est., 1 Del. Co. 521 (1883), there was a petition for order to sell lands of the decedent which were subject to the lien of debts not of record. Order to sell granted. Court said that it was not necessary to show in fact that there were debts not of record. The existence of the statutory liability was sufficient to give the court jurisdiction under the Act of 1853.

(60) Act of March 29, 1832, P. L. 190, Sec. 31: The Orphans' Court which possesses jurisdiction of the account of an executor or administrator, shall have power to authorize a sale or mortgage.

ceedings under the earlier act of 1832 were sometimes irregular, and it was sought to justify them under the provisions of the Price Act, which, however, the Supreme Court clearly said could not be done.[61]

(A) On application of executor or administrator setting out
  (1) That personal estate is insufficient to
    (a) pay debts and provide for education and maintenance of minor children
    (b) or pay debts.
(B) Or of any person interested.
  (2) That on final settlement of the administration account it appears that
    (a) there are not sufficient personal assets to pay balance due from estate of the decedent.
(C) The executor or administrator must
  (1) Exhibit to the court inventory and appraisement of all personal estate.
  (2) File full and correct statement of all real estate.
  (3) File a list of debts.
  (4) No authority to sell to be granted until the executor or administrator shall have filed a bond with sufficient security to be approved by the court.
  (5) No real estate shall be disposed of contrary to the terms of any marriage settlement.
  (6) The mansion house or the most profitable part of the estate shall be reserved to the last.
  (7) The court may refer the case to an examiner.
  (8) Sale to be public upon twenty days' notice by advertisement in at least one newspaper published in the county, if there be one; if none, then in an adjoining county and by handbills affixed in at least three of the most public places in the vicinity of such estate.
  (9) Where real estate is situate in another county or in the same and another county, the Orphans' Court having jurisdiction of the accounts shall be satisfied with the propriety of the sale, and if so satisfied, shall issue an order authorizing the Orphans' Court of the county where the lands lie to, on petition of administrator or executor, make an order for a sale or mortgage, return of sale to be made to the Orphans' Court of the county where the real estate lies, whereupon the same shall, if approved by the court, be confirmed.

(61) Jacoby v. McMahon, 174 Pa. 133 (1896) Dean, J., at 136, s. c. 189 Pa. 1 (1898). See opinion of Clark, J., in Spencer v. Jennings, 114 Pa. 618 (1888), at 625, that the Act of 1853 does not authorize a sale for the payment of debts.

In order that the reader may more clearly understand the cases to which that act applies, we shall now notice a few of the decisions.

§ **116.** In Grenawalt's Appeal,[62] the owner in fee of the property, who was also the executor of the decedent, petitioned for authority to sell, setting out that the sale was for (1) the payment of a legacy, (2) the discharge of debts against the estate, (3) the purpose of repair and improvement. It appeared that the legacy was not a charge on the real estate, and the court held that it was proper to authorize the sale for the second and third purposes. The language of Thompson, C. J.,[63] very strongly countenanced the doctrine that there is jurisdiction under the act to sell for the payment of debts. The decision was clearly correct on the facts, as the fee was subject to an executory devise, and there was, therefore a case coming within another provision of the act.[64]

§ **117.** The same notion, that the act authorized a sale for the payment of debts, was obviously entertained by the reporter in preparing the syllabus[65] in Hower's Appeal, although, strangely enough, there is nothing whatever in the case to which the statement can be referred.[66]

§ **118.** In Pierce's Est.,[67] the court, in an opinion by Allison, P. J., said that in the case of a sale by a guardian of a minor, where the land was subject to the lien of decedent's debts not of record, it was necessary to join the personal representative of the decedent so that the title of the purchaser would be free from liens. Since, however, the act authorizes the sale free from liens for that very purpose, and there is no provision directing the joinder of the personal representative, a sale by the personal representative for the payment of debts would, under this proviso, be improper. It seems pretty clear that the learned judge was laboring under a misapprehension as to the construc-

(62) 37 Pa. 95 (1860), s. c. Luz. L. Obs. 243; sub. nom. Greenwalt's App., 17 L. I. 404.

(63) See § 30, ante.

(64) See § 111, ante, executory devise.

(65) 55 Pa. 337 (1867).

(66) See also remarks of Rice, P. J., in Kiskaddon v. Dodds, 21 Super. Ct. 351 at 357, 358 (1902).

(67) 7 Phila. 475 (1869), s. c. 26 L. I. 13, sub. nom. Clothier's Pet., 3 Brews. 254.

tion of the act, and that this is so is further shown by the circumstance that this practice has been disregarded and the courts do not require the joinder of the personal representative.

§ **119.** In Orwig's Estate,[68] the heirs of the decedent petitioned for leave to mortgage under the Act of 1853, and it was held that the mortgagee would take a title free of the lien of debts not of record. It did not appear that the mortgage was for the purpose of raising money to pay debts, and one of the owners in the case was a minor, which would of itself sustain the jurisdiction of the court.

§ **120.** In Yard's Estate,[69] the guardian of a minor had a sale of his ward's interest confirmed under the Price Act, the land being at the time subject to the lien of the debts not of record of the father of the minor.

§ **121.** In Spencer v. Jennings,[70] an administratrix made a mortgage under order of the court, to raise money to pay debts not of record, and it was held that the mortgage was void, as the court was without jurisdiction to make the decree. The heirs were minors but that circumstance was immaterial as the petition was presented by the administrator and not by the guardian. Trunkey, P. J.,[71] said that a petition by an executor or administrator for authority to sell for the payment of debts, must be presented under the provisions of the Act of March 29, 1832,[72] and the clause in the Price Act[73] providing that nothing contained in the act shall be taken to repeal or impair the authority of any other act of assembly relating to sales, prevented the repeal of the Act of 1832. The circumstance that the petition was presented in the wrong county was immaterial in this aspect of the case. Petition was presented in the county where the land lay, which is proper under Act of 1853, but not proper under the Act of 1832, under which petition must be presented to the court having jurisdiction of the accounts.

(68) 7 Pa. C. C. 71 (1889), s. c. 19 Phila. 158, 46 L. I. 99.

(69) 15 W. N. C. 422 (1884), s. c. 17 Phila. 436.

(70) 114 Pa. 618 (1886), s. c. 19 W. N. C. 10, 42 L. I. 230, 34 Pitts. L. J. 243; affirmed on re-argument in 123 Pa. 184 (1889), s. c. 23 W. N. C. 43, 46 L. I. 158, 36 Pitts. L. J. 227. See 139 Pa. 198 (1891).

(71) At p. 624.

(72) § 31 P. L. 190.

(73) See § 20, 24, ante.

On reargument,[74] the court, Clark, J., seemed to draw the distinction that there was no jurisdiction when the petition was presented by an administrator, but that if the minor had an interest in the land and presented a petition setting forth that it was subject to the lien of debts not of record, there would be jurisdiction to order a sale.

§ **122.** In Burkhard's Estate,[75] the executrix of a decedent who died domiciled in Philadelphia County, presented a petition to the Orphans' Court of Schuylkill County to confirm a private sale of a certain lot in Pottsville, so that it would be clear of the lien of the debts of the decedent not of record. The petition set out that it was proposed to use part of the proceeds in payment of a mortgage on decedent's property in Philadelphia, and the court very properly held that there was no jurisdiction.

§ **123.** In West v. Cochran,[76] the administrator d. b. n. c. t. a. had presented a petition in the usual form to sell for the payment of debts, upon which an alias order to sell had been made, under which the administrator had made a sale of a portion of the real estate, return of which sale was before the court for confirmation, whereupon the widow and guardian of the minor children of the decedent filed exceptions to the confirmation of the sale, upon which a rule to set aside the sale was granted and which, with the exceptions, remained undetermined. In this state of the record, the guardian of the minor presented a petition under the Price Act, setting forth that it would be to the interest and advantage of the minor to mortgage the real estate and use the proceeds to pay off the debts, and then appropriate the income from the property to the liquidation of the mortgage. The court held that the order directing the execution of the mortgage was correct. The decision is clearly sound, as the act authorizes the sale, etc., of a minor's estate whenever it is to his interest and advantage to do so. The propriety of the course adopted in this case was so obvious, that the circumstances that incidentally the proceeds of the mortgage were used to pay the debts and thus carry out a purpose contemplated by the earlier acts, and which had been decided were not within the provisions of this

(74) 123 Pa. 184.

(75) 1 Mona 474 (1889), affirming 6 Pa. C. C. 374 (1889).

(76) 104 Pa. 482 (1884); sub. nom. West v. Cochrane, 41 L. I. 330, 31 Pitts. L. J. 373.

act, was not material. The language of Green, J., however, does not meet the real point in the case and seems to revert to the unsound position taken by Thompson, C. J., in Grenawalt's Appeal.[77]

Distinction Between Price Act and Earlier Acts.

§ **124.** The distinction is now clearly drawn that the provision in the act covers the case where it is desired to sell land which is liable to the lien of debts, as where the parties interested are unable to make a good title because of the lien of debts, the distinction being[78] between a sale to discharge the lien of debts not of record and a sale for the purpose of raising a fund to pay these debts.

The principle that this proviso does not authorize a sale by an executor or administrator for the payment of debts has been followed in several other cases collected in the note.[79] The jurisdiction under the Act of 1853 is irrespective of the state of the accounts or the account of personal estate, and is designed solely to furnish a means of disposing of the title which is subject to the lien of debts.

Private Sale Discharges Lien of Debts not of Record.

§ **125.** A doubt was raised whether a private sale under the

(77) 37 Pa. 95 (1860). See § 30, ante: "All the facts required by the Act of 1853 to give jurisdiction to the Orphans' Court to make the order to mortgage were present and were substantially set out in the petition. There is no express language in the act, nor are there any words producing a necessary inference that an order to raise money to pay debts can only be ganted to an executor or administrator, nor is there any prohibition, express or implied, against the granting of such an order to a guardian. On the contrary, the letter of the act expressly authorizes the court to grant to a guardian an order to sell, lease or mortgage, the real estate of minors, 'whenever a decedent's real estate is subject to the lien of debts not of record.' We could not deny the power except by implication against the proper and natural meaning of the words of the statute, and this we cannot do," Green, J., in West v. Cochran, 104 Pa. 482 at 489 (1884), sub. nom. West v. Cochrane, 41 L. I. 330, 31 Pitts. L. J. 373. See remarks of Clark, J., on this case in Spencer v. Jennings, 123 Pa. 184 (1889) at 196.

(78) As put by Hanna, P. J., in Lambrecht's Est., 22 W. N. C. 24 (1888); Trunkey, J., in Spencer v. Jennings, 114 Pa. 618 (1886), s. c. 19 W. N. C. 10, 44 L. I. 230, 34 Pitts. L. J. 243.

(79) Miller v. Spear, 21 W. N. C. 554 (1887); Lambrecht's Est., 22 W. N. C. 24 (1888); confer Bloodhart's Est., 2 Pa. C. C. 476 (1886).

act discharged the lien of debts of a decedent, and although Mr. Price[80] was of the opinion that the private sale would discharge the lien of the debts, the doubt was sufficiently strong to necessitate the intervention of the legislature. Accordingly it was provided by the Act of March 23, 1867,[81] that a private sale discharged the liens.[82]

No Jurisdiction where Lien of Debts has Expired.

§ **126.** Where, however, a stranger paid the debts of the decedent, and petitioned for an order of sale under the Price Act, the court dismissed the petition,[83] as there had been no action brought by the creditors within the statutory period to preserve the lien of debts, and the stranger, therefore, paid claims which could not be asserted against the land. Non constat, however, that if the debts had been a lien on the land, he could have been permitted to succeed in the petition.

In Crawford's Estate,[84] there was a sale under the Price Act upon petition by the widow and heirs to relieve from the lien of debts not of record, which was made within two years after the decedent's death but not confirmed before the expiration of the two years. The two years expired on August 16, 1907; the alias order was issued June 15, 1907; the property was sold July 18, 1907; return of the alias order was on September 16, 1907, and upon exceptions to the confirmation being filed by the purchaser, the action of the court below confirming the sale was reversed on appeal, as the purchaser would take no title.

(80) Price on the Act for the Sale of Real Estate, p. 132. See remarks of Henry Wharton, 6 W. N. C. 545 (1879).

(81) P. L. 43. The exact words are as follows: "Section 2. That private sales, made by order of court, under the said act of the eighteenth of April, one thousand eight hundred and fifty-three, shall discharge the premises sold from the lien of the debts of the decedent, except debts of record, and debts secured by mortgage: Provided, That the security, required by said act, shall have been duly entered."

(82) The executor, trustee or administrator, or any person interested, may petition the proper court for a decree directing that the real estate of the decedent shall be held and enjoyed free and clear of any lien of debts not of record. Act of June 8, 1893, P. L. 392, Sec. 2, 3.

(83) Moyer's Est., 11 Pa. C. C. 528 (1884), s. c. 1 D. R. 600, 9 Lanc. L. R. 203, 3 North. Co. 189. There is a misprint in the county court report in this case: citation should be petition at end of report, and there is a misprint of 1863 for 1853.

(84) 221 Pa. 131 (1908).

Distribution of Proceeds of Sale.

§ **127.** The creditors of a decedent are, of course, to receive payment out of the proceeds first,[85] which where there are no debts, may be awarded directly to the heirs,[86] or the executor, trustee or devisee or person holding the title to the land. In such a case, however, security must be ordered to protect any possible creditors.

Act Applies to Executors Selling Under a Power.

§ **128.** The act applies where the title to the land is held by an heir, devisee, trustee or executor, and whether there is or is not power to sell the land.

An executor selling under a power of sale in a will may have the sale ratified under this provision of the act so that the purchaser will take a title free from the lien of debts,[87] although the exercise of such a power will relieve from the lien of debts. It seems that a purchaser may insist upon the executor resorting to the court in this case in order that the title may be relieved from the doubt which may exist as to whether the power of sale is sufficiently worded as to discharge the lien of debts.[88]

Modified Fees.

§ **129.** A modified fee is a variation of the fee simple estate, and appears on several forms, e. g., conditional fees, estates tail, base fees, qualified fees, and determinable fees.[89] Of these the estate tail is separately provided for and has already been discussed.[90] Of the others, the only one which really arises in Pennsylvania is the case of the determinable fee. A determinable fee exists where there is a limitation to a grantee and his heirs until the happening of a specified contingency, the con-

(85) Yard's Est., 17 Phila. 436 (1885), s. c. 15 W. N. C. 422, 42 L. I. 17. But debts which have lost their lien cannot be paid out of the proceeds, cfr. Commonwealth v. Pool, 6 Watts 32 (1837).

(86) Green's Est., 5 Pa. C. C. 605 (1888), s. c. 19 Phila. 55, 45 L. I. 174, 5 Lanc. L. R. 217

(87) Wainwright's Est., 11 Phila. 147 (1876), s. c. 33 L. I. 280, 3 Law Times, O. S. 95. Confer Donnelly v. Byers, 234 Pa. 339 (1912).

(88) For a further discussion of this, see 59 Univ. of Penn. Law Review, p. 597.

(89) Foulke, Rule Against Perpetuities in Penna., (1909) § 21.

(90) See § 90, ante.

tingency being such that it may never happen or so long as an existing state of things shall endure the state of affairs being such that it may endure forever. In all these cases the donor has a possibility of reverter after the fee which is a vested interest.[91]

The act provides that such sale, etc., may be made where property is devised or granted for special or limited purposes. This clause may have been designed to cover the case of a determinable fee. The difficulty, however, in exercising the jurisdiction under the act as to a case of this kind lies in the circumstance that this possibility of reverter is a vested interest, and consequently it seems impossible to exercise the jurisdiction without the consent of that interest.[92]

It was decided in Saxton v. Mitchell,[93] that the possibility of reverter was a vested interest against the consent of the owner of which the court would have no jurisdiction to direct a sale under a special act of assembly.

In Gumbert's Appeal,[94] land had been conveyed to certain Presbyterian and Lutheran societies for the only use and purpose of a church and churchyard and burying place and for supplies of the gospel against the grantor, his heirs and assigns forever. It did not appear whether the societies were incorporated or how the title was taken. The ground was subsequently abandoned after a church had been built thereon as a place of worship, but still continued to be used as a place for the burial of the dead. The societies were subsequently dissolved and on petition of one Jacob Kepple, who alleged that he was the only surviving member of the council of the church which had been erected on the ground, the court ordered a sale of the property under the Price Act,

(91) Foulke, Rule Against Perpetuities in Penna., etc., (1909) § 30.

(92) See remarks of Archibaald, J., in Church's Pet., 1 Lack. L. N. 89 at 98 (1887).

(93) 78 Pa. 479 (1875). In this case the testator, who died in 1857, provided as to a certain tract of twenty acres of land, as follows: " . . . which I hereby reserve forever for the use of the members of the Methodist Episcopal Church to hold their camp meetings on." An attempt was made to sell the land under the Act of 1853. The court held that the act did not apply, and a special act of the legislature was passed in 1871. The case came up on an application of the parties authorized under the special act for the appointment of a trustee and an order of sale. The court held that this act was unconstiutional and dismissed the application on the objection of the heirs and legatees of the testator.

(94) 110 Pa. 496 (1885).

and appointed a trustee to make the sale, who delivered the deed to the purchaser. On exceptions being filed by a number of persons who were members of the congregation which had worshipped at the church constructed on the ground or who had relatives buried in the graveyard who did worship at the church, the court set aside the sale and ordered the deed to the purchaser delivered up and cancelled on the ground that the petition was made by a person not in interest. The court further said that this was a case of a grant for a special purpose, and that as long as the burial use continued, the ground could not revert to the heirs of the donor. The case, therefore, does not really touch the question of the right of the owner of the possibility of reverter to object to the sale. No case has arisen involving the application of the clause of the act, and it seems doubtful whether the jurisdiction is constitutional as against the objection of the owner of the possibility of reverter.

CHAPTER 6.

Trusts.

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Preliminary Discussion.

§ 130. A trustee has power as dominus of the legal title to dispose of, pledge or deal with it at law. Since all persons dealing with him who have notice of the trust are subject to the claim of the cestui que trust, it follows that he is practically helpless so far as any disposition of the legal title is concerned, unless the consent of the cestui que trust can be obtained, which is not always possible, or unless there is a power in the instrument creating the trust. The case where a trust is superimposed on the legal title will therefore frequently present an obstacle to free alienation or administration of the trust estate either of which may be to the interest and advantage of the cestui que trust. A trustee has power, indeed it is his duty, to rent the trust property,[1] and he may make an ordinary lease without any special power, and in such case the lessee will not be in any danger from the equitable title. If, however, an improvement lease or a lease for a long term of years is proposed, the interest of the lessee may conflict with that of the cestui que trust, and some special authority may be necessary. This case of a lease has been al-

(1) See remarks of Ludlow, J., in Sharp's Pet., 6 Phila. 153 (1866), s. c. 23 L. I. 412.

ready discussed,[2] and our attention in the rest of this chapter will therefore be confined to the case of some form of transfer of the legal title.

Jurisdiction of Equity Independently of the Act.

§ 131. The chancellor had ample power, however, to authorize a sale by a trustee, and would protect the purchaser, if necessary, by an injunction preventing the cestui que trust from proceeding against the land. This jurisdiction was frequently exercised in England. The limited nature of the jurisdiction of courts of equity in Pennsylvania precluded[3] a general resort to this remedy,[4] although cases of trusts for charity are to be found in the books where this jurisdiction was in point of fact exercised, although not so understood by the court.[5]

Act of 1851.

§ 132. By Act of April 3, 1851,[6] the Orphans' Court have power to authorize a sale of real estate within their respective counties, upon application of the trustee, where lands are held in trust under a will for any person or corporation, and it is to the interest of the cestui que trust, the trustee to make the sale. No case has been found of a proceeding by a trustee under this act. It confers jurisdiction only on the Orphans' Court, and the Price Act was passed so soon after it that it has been generally overlooked.

Jurisdiction of the Court now Limited by the Act.

§ 133. The jurisdiction of the court to authorize a sale, etc., is now probably limited by the provisions of the act, and the courts have no further power to authorize a sale under their

(2) See § 48, ante.

(3) Mr. Price, The Act for the Sale of Real Estate, p. 9, says "..... and generally a trust fixed upon the real estate without an express power of sale was considered to make the land inalienable until the trust expired."

(4) For a further discussion of this subject, see Foulke, Rule Against Perpetuities in Penna., etc., (1909) § 758.

(5) See Foulke, Rule Against Perpetuities in Penna., etc., (1909), § 758. Griffiths v. Cope, 17 Pa. 96 (1851); Barr v. Weld, 24 Pa. 84 (1854); Brendle v. Congregation, 33 Pa. 415 (1859); Seebold v. Shitler, 34 Pa. 133 (1859).

(6) P. L. 305.

inherent equity jurisdiction.[8] This proposition is illustrated by the case of Seif v. Krebs,[9] in which case the testator gave certain property in trust for a hospital without giving the trustees power of sale. The trustees undertook to sell, and in a case stated between them and the purchaser as to the marketability of the title, it was decided that the title was not marketable, as they had no power to convey and that they must proceed under the Act of 1853.[10]

Provisions of the Act. Nature of the Cestui Que Trust Immaterial.

§ 134. The various clauses of the act describing the cases of a trust where the court may authorize the disposition specified, when taken together embrace every instance of a trust of real estate, and make it clear that so far the jurisdiction of the court is concerned, the character of the cestui que trust is immaterial. We may therefore simplify matters by saying that in every case of a trust of real estate, the nature of the cestui que trust being immaterial, the court may, in a proper case, authorize the disposition specified in the act.[11] These clauses relating to trusts

(8) See Foulke, Rule Against Perpetuities, etc., in Penna., (1909) p. 465.

(9) 239 Pa. 423 (1913).

(10) Part of the argument in this case turned on the question of construction, whether there was a power of sale in the will.

(11) The various clauses of the act and its supplements are as follows: Sec. 2. Where real estate shall be held for minors, lunatics, habitual drunkards so duly found by inquisition; for the sole and separate use of married women; for religious, beneficial or charitable societies or associations, incorporated or unincorporated; for or by any other corporation; by trustees for any public or private use or trust; generally in all cases where estates have been or shall be devised or limited in trust for special or limited purposes.

Sec. 7. Trustees, etc., may make and take conveyances by deed acknowledged in court without public sale in order to square and adjust lines between adjoining owners; may make and take conveyances to perfect the partition of real estate held in joint tenancy, coparcenary or in common with others; to purchase other real estate when needful (adjoining) to that already owned by any such party or useful to the business thereupon carried on, or when necessary to protect any security or rent held on property exposed to judicial sale.

By the Act of April 18, 1864, P. L. 462, Sec. 1. Trustees, etc., may make and take or join with owners of other undivided interests in making and taking conveyances by deed acknowledged in court and without a public sale in order to change in part or in whole the route and location

have, except in the case of a trust for a charity, given very little difficulty, the case to which they apply being so clear. Very few cases, therefore, have arisen for decision.[12] The practical effect of the proceeding under the act is to cut out the claim of the cestui que trust against the land. Without the proceedings, he would have an election to follow the land or the proceeds.

Where Trustee has Power which cannot be Exercised.

§ **135.** These clauses of the act must furthermore be read in connection with those relating to powers,[13] under which a trustee with a power of sale may proceed under the act, notwithstanding the existence of certain circumstances specified.[14] Where there is no power of sale, the trustee will proceed under the clauses we have just referred to.[15]

Vested Equitable Remainders.

§ **136.** It frequently happens that under the limitations of the instrument creating the trust, the equitable remainders after the life estate are vested. The question then arises whether the court has jurisdiction to authorize a disposition of the title by the trustee against the consent of these equitable remaindermen.[17] Where the remainders are purely equitable, the courts will have power to make a decree nevertheless. The right of the cestui que trust is in personam ad rem,[17a] and it has never been suggested that the right in rem in such case may not be divested from the res and transferred to the purchase money without the consent of the cestui que trust.

Where, however, under the limitations the ultimate remainders

of any right of way or passage existing over and upon adjoining or other lands. To be in the discretion of the court whether to require security in such case.

(12) A few cases of sales of a trust estate are as follows: Rhoades's Est., 4 W. N. C. 527 (1877); Owens' Pet., 3 D. R. 328 (1894); Brooke's Est., 214 Pa. 46 (1906), s. c. 15 D. R. 137.

(13) See § 145, post.

(14) See § 147, post.

(15) See n. 11 § 134 ante.

(17) We have already discussed the case of vested legal remainders, and pointed out that no disposition of the title can be authorized against their consent. See § 12 ante.

(17a) That is, a right against the trust res and against the trustee personally.

are legal and vested, as where the statute of uses applies, the case is different and there is grave doubt whether the courts would have power to make a decree disposing of the legal title against the objection of the remaindermen.[19]

The Petition.

§ 137. The petition may be made by the trustee or by the cestui que trust.[20] The better practice, where the parties are in harmony, is for the trustee to proceed, in which case notice must be given to the cestui que trust. If the trustee refuses or neglects to act, the cestui que trust may take the matter in his own hands, sell, mortgage or lease the property subject to the approval of the court, and then present his petition for a decree confirming the sale, etc. If the court confirms, it will probably direct the trustee to carry out the terms of the contract.[21]

In Dorrance's Est.,[22] there was an estate devised in trust to A. for life, with remainders over. Upon petition of a life cestui que trust for an order directing the trustee to make a mortgage of part of the trust estate to pay for past improvements made by the life tenant who had an option under the will to use and occupy the home farm, which option the life tenant had exercised, the petition was granted directing the trustee to make the mortgage. Not clear whether the mortgage was of the part occupied by the life tenant or of the other part of the trust estate. The life tenant cestui que trust had made the expenditures without the approval of the court or the consent of the trustee.[23]

(19) See § 12, ante, as to vested interests. See § 138, post, as to consent of the cestui que trust.

(20) For instance of petitions by cestui que trust, see Sharp's Pet., 6 Phila. 153 (1866), s. c. 23 L. I. 412; Dorrance's Est., 9 York 69 (1895). The language of the court in McClurg's Est., 22 Pitts. L. J. 133 (1875), that the cestui que trust may not petition, may be disregarded and confined to the case before them, in which there had been no trustee appointed. The cestui que trust should show reason for the non-petitioning of the trustee.

(21) In Goddard's Est., 198 Pa. 454 (1900), aff. 9 D. R. 703 (1900), it did not appear who made the petition, probably by the trustee.

(22) 9 York 69 (1895).

(23) Confer, Dorrance's Est., 13 D. R. 664 (1904), where the question arose as to the right of the cestui que trust to compensation out of the fund.

Notice to and Consent of Cestui Que Trust.

§ **138.** Where the proceedings are by the trustee, notice must be given to the cestui que trust, or if more than one, to all of them. If the cestui que trust is a lunatic, notice must be given to the committee or else no title will pass under the proceedings.[24] If the cestui que trust is under disability, provision must be made by the appointment of a guardian or committee. Where the cestui que trust is a married woman, it is probable that her husband must be notified, and if she joins in the petition, he should sign also.[25]

If the proceeding is by the cestui que trust, it is clear, although there is no authority for the statement, that notice must be given to the trustee, and if the court grants the petition, the trustee will ordinarily be directed to proceed and make the sale. The consent of the cestui que trust is almost indispensable.[26]

A distinction may be drawn as to the necessity of consent between a life tenant and one having a contingent interest in remainder. Less regard is generally paid to the contingent remainders in such case, and the consent of the life cestui que trust is usually regarded as sufficient.

In Leedom v. Lombaert,[26a] there was a mortgage by a testamentary trustee under order of the Orphans' Court without notice to the remaindermen cestui que trust who were minors and without guardians. The mortgage was made to raise money to improve the real estate. In proceedings under the mortgage it was held that the trustee could not set up in defence the lack of notice to the remaindermen. The court had jurisdiction of the trust, the trustees and the subject matter, and the decree could not be

(24) Hirst's Est., 147 Pa. 319 (1892).

(25) See § 19, ante, as to notice.

(26) Hollins's Est., 16 D. R. 441 (1907). See, however, Goddard's Est., 198 Pa. 454 (1901), aff. 9 D. R. 703 (1900), where the objection of a cestui que trust claiming to have an appointment set aside was disregarded as premature. The courts will very rarely decree a sale where the cestui que trust refuses to consent. A case may arise, however, where one or several, by a refusal, prevent a proper disposition of the legal title. The only difficulty as to consent which arises in such a case is where the equitable remainders are vested. See § 99, ante. As to when notice will be presumed, see Smith v. Schwarz, 209 Pa. 79 (1904); McGuirk v. Friel, 9 Del. Co. 22 (1906).

(26a) 80 Pa. 381 (1876).

impeached collaterally. Furthermore, the mortgagor alone made defence. The cestuis que trust who received no notice did not defend and it did not appear that they were not fully secured by the security entered by the trustee.

Sole and Separate Use.

§ **139.** There was no occasion to insert any special provision as to the sole and separate use because the peculiarity of that case of a trust lay in the nature of the cestui que trust and the equitable title, and the incapacity of the cestui que trust concerning the same. Mr. Price says[27] that before the act the title of married women, limited to her sole and separate use, could not be conveyed unless there was express power to that effect from which it might appear that this section was designed to enable the cestui que trust to convey her equitable interest. At that time the distinction between the legal title and equitable interest was imperfectly apprehended. There is no occasion to suppose that the act relates to the equitable interest, to the conveyance of which the cestui que trust is amply competent except when expressly restrained by a valid clause in the instrument creating the trust, as in the case of a sole and separate use.[28]

Sale of Equitable Title of Cestui Que Trust.

§ **140.** There is no basis for the notion that the court has jurisdiction to authorize a sale, etc., of the equitable title of the cestui que trust, and no case has been reported of any such decree. In the case of a sole and separate use and spendthrift trust, the cestui que trust is incapacitated from making a conveyance under the terms of the instrument creating the trust. The act, however, contains no clause authorizing the interposition of

(27) Price, the Act for the Sale of Real Estate, p. 9 (1874).

(28) By Act of May 11, 1874, P. L. 131, Sec. 1, where trustees under deed of a fee simple sole and separate use, without restraint on alienation prior to Jan. 1, 1870, upon request or direction of the cestui que trust, sold in good faith for a valuable and full consideration, which was paid to the cestui que trust and without leave of court, and the purchaser entered into possession and erected valuable improvements, and sold to any other persons, the courts may, upon petition by any person interested, approve the sale with like effect as if sold under previous authority of the court and direct the proper person to execute a deed with or without security, as the court may direct, notice to be given to all parties personally or by publication, as the court may direct.

the court in such a case. There is no law conferring an immunity from alienation because the disability is imposed by the donor in creating the trust and is therefore not a law.[29] This is true also of a sole and separate use because the incapacity of the cestui que trust is the result merely of a rule of construction.[30] The act was passed to promote facility in dealing with real estate, and since the trustee is fully empowered to act, there is no necessity, from this point of view, for resorting to the act in order to authorize the cestui que trust to dispose of his equitable interest, and in all cases where there is no restraint, he has full power to make such an assignment.

Sale by Trustee to Cestui Que Trust.

§ **141.** There is no reason whatever why a trustee should not be authorized to convey, mortgage or lease to the cestui que trust. Of course no such deal should be permitted to disturb the trust where there are other parties in interest. A petition for a sale by the trustee to a cestui que trust was presented in Sharp's Pet.,[31] but the court declined to grant the prayer as it was not considered, upon the evidence, advisable. The case arose on exceptions to master's report, master having reported in favor of this sale. The exceptions were sustained. The remarks of Ludlow, J., that the objection to the granting of the petition was that if the petition was granted, the cestui que trust would then become the owner of the estate devised to him in trust, and could convey it to whomsoever he saw fit, overlook the fact that the trust would be transferred to the proceeds of the sale, and it was utterly immaterial, so far as that was concerned, if the price was adequate, whether the property was retained or sold.

Proceeds of the Sale.

§ **142.** The proceeds of the sale are to be held upon the same trusts, and subject to the same limitations, as the land which was sold, and are not to be paid over to the cestui que trust unless he is the sole party in interest and the limitations of the trust permit. Where a testator devises a farm to a trustee for the life of her nephew, with remainder to his children, and directs

(29) See § 38, ante, on immunity from alienation.

(30) See Foulke, Rule Against Perpetuities, etc., in Pennsylvania, (1909) Chap. 24.

(31) 6 Phila. 153 (1866), 23 L. I. 412.

that the nephew shall have the right to occupy the farm and buildings "so long as he should continue to cultivate the same according to the rules of good husbandry, and keep the place in good order and repair," and the land is subsequently sold under the Price Act, the children of the nephew are not entitled to have the proceeds of the sale distributed directly to themselves. In such a case the trustee must invest the proceeds and pay the income to the life tenant.[33]

Trust for a Charity.

§ **143.** It seems necessary, although the act provides, as we have seen, in effect for every case of a trust, irrespective of the nature of the cestui que trust, to notice separately the case of a trust for a charity. The peculiar nature of a charitable trust has caused no small confusion in every branch of the law in which it appears, and it has frequently been supposed that a charitable cestui que trust called for the application of some special rule of law when it appears on careful reflection that no such necessity exists. The subject under consideration has been involved in some confusion. We may first notice that the trust may be for (1) a charitable corporation, (2) a definite or indefinite charitable object, (3) what are sometimes classed under charitable objects, to-wit, indefinite non-charitable objects. The act, however, makes special provision only for a sale, etc., in the case of a trustee for religious, beneficial or charitable associations incorporated or unincorporated, and all other cases of a charitable trust are left unprovided for unless they are included which they must be in the case of trustees of any public or private use or trust. The nature of the cestui que trust has no bearing on the jurisdiction of the court to order a sale, but may have a very important bearing in fact on the question of the expediency of the sale.

In Mercer Home, Fisher's Appeal,[34] there was a devise of certain land in trust for a charitable corporation to be formed. The corporation was formed, and the executors of the testator conveyed the land to the corporation. The corporation petitioned

(33) Penn-Gaskell's Est., (No. 2) 208 Pa. 346 (1904); Goddard's Est., 198 Pa. 454 (1900), aff. 9 D. R. 703 (1901).

(34) 162 Pa. 232 (1894). See § 34, ante.

for leave to sell part of the land at private sale under the Price Act, and the petition was granted.[35]

Where, however, the title is in trustees for a church or charity, the case is the same as any other trust and proceedings must be instituted under the act for the sale, etc., unless there is express power thereto in the instrument creating the trust.

Where the trustees of a church held land in trust for certain charitable purposes, and a conveyance was made without previous resort to the court under the act, it was held it would not convey a marketable title.[36]

In Burton's Appeal,[37] the trustees for a church were authorized to sell land held in trust for the church,[38] and it was held that the discretion is in the court, and the vote of the congregation is not essential or binding but may be considered as a fact bearing on the expediency of the sale.

In Sellers Church's Pet.,[39] land conveyed to trustees for the use of the members of a religious denomination as a place of worship forever, was decreed to be sold free from the trust, the purchase money being invested in other property held for the same uses.

(35) For instances of the exercise of this jurisdiction, see: Stallman's App., 38 Pa. 200 (1861). Sale of lot devised in trust for use as a burial lot forever, Funck's Est., 16 Super. C. 434 (1901). See vague case of Church v. Gray, 198 Pa. 321 (1901); Church's Pet., 1 Lack. L. N. 89 (1887).

(36) Nauman v. Weidman, 182 Pa. 263 (1897), s. c. 40 W. N. C. 509, 37 Atl. Rep. 863, 14 Lanc. L. R. 305.

(37) 57 Pa. 213 (1868).

(38) As to the discussion in this case of immunity from alienation, see § 34, ante.

(39) 139 Pa. 61 (1890).

CHAPTER 7.

Powers.

Preliminary discussion. Division of powers ..... § 145
Provisions of the act ..... § 146
Powers of sale
Provisions of the act as to ..... § 147
Time not arrived for exercise ..... § 148
Unreasonably withhold consent ..... § 149
Powers of appointment ..... § 150

Division of Powers.

§ **145.** Powers are of several kinds, and for the purposes of this discussion may be divided into three classes:

(1) Powers vested in a fiduciary, as a trustee or executor, which includes powers ancillary to a continuing trust, and a mere power in trust the distinction between the two not being material for the purposes of this discussion.

(2) Powers of appointment.

(3) Powers in a legal owner to do something with the property not incident to his estate, as power in a life tenant to sell in fee.

Provisions of the Act as to Powers.

§ **146.** The act makes no separate provision for these kinds of powers but simply speaks of powers of sale, and in one instance powers of appointment.[1]

(1) The words of the act are as follows: Such sale, etc.., may be decreed whenever real estate shall be held. . . . "By trustees for any . . . and although there may exist a power of sale but the time may not have arrived for its exercise or any preliminary act may not have been done to bring it into exercise or the time limited for its exercise may have expired or any one or more persons required to consent or join in its execution may have become non compos mentis or have removed out of the state or died or should refuse to act or unreasonably withhold consent, also when there has been or shall be a defective appointment in any deed or last will and testament and the necessary power is not given to the executor, devisee or appointee to make sale and conveyance of real estate." The clause providing that every power to sell in fee simple real estate created by deed or will shall be taken to confer an authority to reserve, sell and convey ground rents, is discussed in § 51, ante, referring to conveyances on ground rent.

Since the language follows and relates to the previous clause describing trusts, it is clear that the jurisdiction conferred by the act is to be limited to the case of a trust, and, therefore, a power of sale purely executorial in its nature, can derive no assistance from the court under this act.[2]

The act provides that such sale, etc., may be decreed when a power of sale has been reserved and the power cannot be exercised for certain reasons enumerated in the act. This language may apply to a power in a trustee or a power annexed to a legal estate, as a power in a life tenant. The word "reserved" of course, plainly implies that the power has been held out by something granted, and is therefore properly applicable only to a power reserved to a donor or grantor, and would not cover a power conferred upon a trustee or a grantee of a legal estate or devisee under a will. The language of the act has never been so narrowly construed as this, and it seems to be generally assumed that these words contemplate all cases of powers granted to trustees under deeds or wills or to tenants of legal estates. The case where there is no power of sale at all, curiously enough, is not specifically mentioned in the act, and is only inferred from those clauses conferring power to direct a sale in the case of trusts.[2a]

Provisions of the Act as to Power of Sale.

§ **147.** The particular instances in which a power of sale cannot be exercised and such sale, etc., may be decreed, are enumerated in tabular form in note.[3] All these cases are perfectly plain and no decision has been made as to any of them except the case

(2) The case where there is a power of sale, and the question is whether the power shall be exercised involves a different question, for a case of which see Rogers's Est., 185 Pa. 428 (1898).

(2a) See § 135 ante.

(3) Power of sale
- Time not arrived for its exercise
- Time limited for its exercise has expired
- Preliminary act not done to bring it into exercise
- Persons required to consent or join in its execution are
  - Non compos mentis
  - Removed out of the state
  - Died
  - Refused to act
  - Unreasonably withhold consent.

where the parties required to consent or to join in the execution of the power unreasonably withhold consent.

Time not Arrived for Execution.

§ **148.** The act also confers jurisdiction to authorize the sale, etc., where there is a power of sale but the time fixed for its execution has not arrived. But two cases have been found on the point, both in the lower court, and neither of them clear. There seems to be some doubt as to the jurisdiction conferred by this clause. If, as sometimes happens, there is any person in interest who has a vested right in the execution of the power at the time specified, then it seems that he can compel the postponing of the execution of the power until that time. In such a case the court, it seems, has no jurisdiction to direct the sale at a prior time against his consent.[4]

Unreasonably Withhold Consent.

§ **149.** The phrase "unreasonably withhold consent" appears under that clause of the act relating to the various cases of powers of sale. It seems to be a proper construction that it only applies to the case where a power of sale is granted and the consent of someone is required to the exercise of the power, and that person unreasonably withholds consent.[5]

(4) Price on The Act for the Sale of Real Estate, (1874) pp. 92, 93. Myer's Est., 1 D. R. 140 (1892), s. c. 11 Pa. C. C. 194, 30 W. N. C. 175. In this case the sale was committed to the discretion of the trustees upon the death of certain persons. The petition was presented during their life, and the court said that it had no power to order a sale. In Schaffer's Est., 1 Woodw 387 (1867), a petition was presented for an order of sale of a decedent's real estate in anticipation of the period appointed by the testator for the sale of the same. The petition was referred to an auditor, and as all parties had not joined in the court said that an actual necessity for the sale must be shown in such a case.

(5) When the testator requires that the sale be made with the consent of one or more persons, the validity of the exercise of the power is conditioned on that consent, which must be personal and cannot be given by anyone else. It seems that the statute of fraud applies and the consent must be in writing, Dictum, Kennedy, J., in Kling v. Hummer, 2 P. & W. 349 at 354 (1831), and that the consent is revocable up to the time of the delivery of the deed unless founded on a valuable consideration. Accordingly the assent was permitted to be withdrawn in Kling v. Hummer, 2 P. & W. 349 (1831). Consequently, if the person designated dies, the power cannot be exercised; if given to two or more it

The phrase "unreasonably withhold consent" applies only to the cestui que trust of a trust estate as pointed out by Ashman, J., in Kerner's Estate.[6] So also it was said by Penrose, J., in Hollins's Est.,[7] that it only applied to inseparable interests as cestui que trusts, and therefore the withholding of consent by a tenant in common who holds independently and can force partition, is immaterial. The position of the clause is such that it clearly relates to powers and not to any other case. The word "required" seems to refer to some previous instrument imposing the requirement and hardly expresses the joinder necessary from a party in interest under operation of law or a tenant in common. In can hardly be properly said that a tenant in common is required to join in a sale of the common property. The clause has rarely been before the court for construction.

Freeman's Estate,[8] simply discusses whether on the facts the withholding of consent by one-eighth of the cestui que trust to a sale by a trustee was unreasonable. It was held that it was and sale was confirmed.[9]

does not survive, and when one dies without the consent having been given, it cannot ever thereafter be exercised, Kling v. Hummer, 2 P. & W. 349 (1831). In Hackett v. Milnor, 156 Pa. 1 (1893), there was a direction to an executor to sell with the consent and approval of three daughters. One daughter died, and a sale approved by the other two was held to pass a good title. In this case, however, under the limitations of the will, the two surviving daughters were practically the sole and absolute owners of the property, and, of course, could not be deprived of their right to make a sale or consent to a sale because of the death of their sister. It is possible in this case to construe the will as meaning that the power of sale was to be exercised with the consent of the three daughters and the survivor, but the court did not place the decision on that ground.

(6) 13 D. R. 311 (1904), s. c. 30 Pa. C. C. 175.

(7) 16 D. R. 441 at 443. (1907.) The petition was presented by a trustee holding a one-fourth interest in trust, and the *cestui que* trust refused to consent. Penrose, J., said that the remedy of the other parties was by partition. See § 22, ante.

(8) 21 D. R. 1 (1911).

(9) s. c. 181 Pa. 405 (1897). The sweeping language of Mitchell, J., at page 405, was pointed out and criticised by Ashman, J., in Kerner's Est., 13 D. R. 311 (1904), s. c. 30 Pa. C. C. 175, as countenancing unduly the doctrine that a sale may be made against the consent of one having a vested interest.

In Goddard's Est.,[10] a petition was presented for an order to sell, and the party objecting had been excluded by a codicil and would only have an interest if the codicil were held invalid. He was not, therefore, required to consent. The language of Penrose, J., in the court below, in placing the jurisdiction on the clause of the Price Act providing for unreasonably withholding consent, seems beside the mark.

In Spangler's Est.,[11] there was a petition by the executors of a will for leave to lease with option to purchase, one party holding one-ninth interest unreasonably withholding consent. It appeared that there was a power of sale in the will with the consent of this party, inter alia. A rule to show cause why contract of lease should not be made apparently on the one-ninth owner was made, who took the ground that the will authorized and directed a sale not a lease, that the lease would not be to the interest and advantage of the estate. The court refused to confirm the sale, and said that the Act of 1853 did not apply. The clause as to unreasonably withholding consent being inapplicable because the respondent was under the terms of the will to consent to a sale, and therefore could not be required to consent to a lease.

Powers of Appointment.

§ 150. The statute confers jurisdiction in cases where there is a defective appointment in any deed or will, and the necessary power is not given the executor, devisee or appointee to make sale or conveyance of real estate. It is difficult to see what the framers of the statute had in mind in inserting this proviso. The appointee or devisee may take an estate for years, a life estate or fee. In the last case he has power to convey anyhow unless there is a modified fee, which case is separately provided for.[12] So also the case of a life estate is included under another clause unless there are vested remainders,[13] in which case no sale, etc., may be authorized unless the vested remaindermen are under some disability or voluntarily join in the sale, in which case the jurisdiction is conferred in another clause of the statute.[14] If

(10) 198 Pa. 454 (1901), aff. 9 D. R. 703 (1900).
(11) 12 York 20 (1898).
(12) See § 129, ante.
(13) See § 12, ante.
(14) See § 22, ante.

the appointment is to an executor, he may, under existing legislation sell whenever it is necessary to do so. We may conclude, therefore, that this clause is superfluous and unnecessary. There is no reported case arising under the clause, and it is doubtful if it has ever been resorted to in practice.[15]

Mr. Price[16] seems to think that this clause confers the jurisdiction usually exercised by equity to remedy defective executions of a power, and to give the judicial remedy, etc., where the executor, devisee or appointee has not the power to cure such defect. It seems a strained construction of the words to extend them to the conferring of such jurisdiction as this. Upon the whole, the matter will have to be left in considerable doubt until the clause has been passed on by the Supreme Court.

(15) See § 24, ante.
(16) Price on The Act for the Sale of Real Estate, (1874) p. 94.

Quere — How, when there is an implied conversion, no power of sale and no executor named?
I think Price act would apply.
Ans: Defective appointment in only in that the necessary power is not given to an executor, and no executor is named.
Also quite language showing implied conversion.

CHAPTER 8.

Specific Performance of Decedent's Contract.

Provisions of the act ..... § 151
Provided for by Act of 1834 ..... § 152
Application of the Price Act doubtful ..... § 153

Provisions of the Act.

§ **151.** The court may also exercise the jurisdiction conferred "whenever a decedent shall have contracted by parol to sell real estate, and those interested do not think it expedient to plead the statute requiring contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold." It is difficult to determine the exact meaning of this provision. It covers only the case of a decedent vendor but does not specify whether the proceedings are to be instituted by the personal representatives or heirs of the deceased vendor or by the vendee.

Case Provided for by Act of 1834.

§ **152.** Either case was provided for by the Act of February 24, 1834,[1] which also covers the case of an oral contract.[2] The existing legislation seemed to fully cover the point, which is perhaps the reason why so few cases have arisen under this provision. Under the Act of 1853, the petition must be presented in the county where the lands lie, whereas, under the Act of 1834 and its supplements, the petition is to be presented in the court having jurisdiction of the account of the executor or administrator even if the land lies in another county.[3]

Application of the Price Act Doubtful.

§ **153.** The application of the Price Act to the case of the parol contract of a decedent is very doubtful. It is not easy to see how the words of the act are capable of practical application.

(1) Secs. 15, 16, 17, 18, P. L. 70, as re-enacted by the Act of April 28, 1899, P. L. 157, for a discussion of which see 58 Univ. of Pa. Law Review, p. 465. For a recent case upon this act, see Gable v. Whiteside, 242 Pa. 188 (1913).

(2) McKee v. McKee, 14 Pa. 231 (1850).

(3) M'Farson's App., 11 Pa. 503 (1849).

Mr. Price says[4] that the clause enables the court to decree specific execution of the parol contract where the parties desire it, notwithstanding the statute of frauds requiring contracts for the sale of real estate to be in writing. A few cases have arisen on the act to which the attention of the learned reader will now be directed.

In the case of Merrell v. Merrell,[5] the vendor conveyed the title to a third person, the vendee being in possession and having made payments on account. The third person died, having devised the premises to B. in trust for C., a minor. The vendor brought ejectment, and it was properly held that the case was not within the Act of 1834 nor within the Act of April 18, 1853, and therefore the plaintiff was entitled to bring ejectment, and the contention of the defendant that the plaintiff's remedy was exclusively in the Orphans' Court under these two acts could not prevail. It was argued that the case was within the Price Act because the devise was upon trust and the person interested was under disability to convey because of the minor. It was not a proper proceeding for the Price Act because the action was ejectment, and it was a mere dictum that the Orphans' Court had no jurisdiction because the proceeding was in the Common Pleas.[6]

In Anders's Estate,[7] where the executors petitioned for permission to convey under the oral contract; the petition was defective and was refused. The court said that it was doubtful which act the petition came under. The petition did not set out the contract with sufficient particularity. It was by the executors but the devisees under the will were not notified.[8]

(4) Price on The Act for the Sale of Real Estate (1874), page 97.

(5) 5 Pa. C. C. 531 (1888), s. c. 5 Kulp 125, 6 Lanc. L. R. 17.

(6) See remarks of Rice, P. J., in this case on this clause of the act, at 533, that the case of a parol contract of a decedent was not within the mischief to be remedied by the Price Act.

(7) 4 W. N. C. 382 (1877).

(8) See also Lindsay's Pet., 2 Del. Co. 197 (1878).

CHAPTER 9.

Partition.

Preliminary ..... § 154
Provisions of the act ..... § 155
Jurisdiction under the act as to partition proceedings ..... § 156
Jurisdiction under the act as to amicable partition
Preliminary discussion ..... § 157
Wilson's Estate ..... § 158
Hirsh's Estate ..... § 159
Thomas's Estate ..... § 160
Hunsworth's Estate ..... § 161
Conclusion as to jurisdiction ..... § 162
Security in case of partition ..... § 163

Partition.

Preliminary.

§ **154.** Partition is the process by which the owners of undivided interests in the same property divide the property amongst themselves, which they may do either by selling the property and dividing the proceeds or by dividing the property itself so that each one becomes the entire owner of an aliquot part or portion of the property instead of an undivided interest in the whole. They may effect this by a voluntary united action, which is generally referred to as amicable partition, or, where they are not agreed, by instituting the proceedings provided by law, which will then be a partition involuntary as to some. Of course they cannot unite in a voluntary amicable partition unless they are all sui juris. A case may arise where one or more of the undivided interests are vested in a person under legal disability, or vested in a trustee who has no power to join in a partition. The usual power of sale vested in a trustee is not generally regarded as sufficient to enable him to join in a voluntary partition. In each of these cases, however, the owner of the undivided interest may make a sale of his interest to another tenant in common, by which a partition will be practically accomplished.

Provisions of the Act.

§ **155.** The Price Act contains two clauses conferring juris-

diction on the court in cases of partition,[1] and there is considerable doubt as to just what jurisdiction is vested by the words of the statute. We may discuss the subject under two clearly defined headings of amicable voluntary partition and involuntary partition proceedings in equity or at law.

Jurisdiction Under the Act as to Partition Proceedings.

§ **156.** It seems that the clause in Sec. 2[2] was inserted in order to provide for the case where in partition proceedings in equity the partition could not be consummated owing to the disability of one or more of the parties. The attention of the learned reader is called to the distinction which existed at that time between partition proceedings at law and partition proceedings in equity. Where the proceedings were at law, the judgment of partition operated to vest the title in the parties in severalty. Where the proceedings were in equity, the chancellor had no jurisdiction to dispose of the legal title, and it was necessary for the parties to the proceedings to execute deeds carrying out the decree of the court. If in such case any one or more of the parties were unable to convey, the proceedings would be held up perhaps indefinitely. Now, however, by the provisions of the Act of March 14, 1857,[3] it is provided that the judgment of partition in equity shall have the same effect as at law and now no conveyances are necessary. This clause of the act, therefore, may be regarded as obsolete.

Preliminary Discussion of Amicable Partition.

§ **157.** Sec. 7 seems to cover the case where the jurisdiction is really needed, and that it where one or more of the owners

(1) These are as follows: In Sec. 2 it is provided that the court shall have jurisdiction to decree a sale, etc., "whenever in proceedings in partition in equity it shall appear that real estate cannot be divided without prejudice to the interests of the owners." In Sec. 7, it is provided "that it shall be lawful for trustees, guardians, committees, married women and corporations in all the cases aforesaid, under the decree of the court as aforesaid, and with the like effect and indemnity to them in acting thereunder, to make and take conveyances, by deed, acknowledged in court, without public sale, in order to square and adjust lines between adjoining owners, to make and take conveyances, to perfect the partition of real estate held in joint tenancy, coparcenary, or in common with others."

(2) See Price on the Act for the Sale of Real Estate (1874), p. 120.

(3) P. L. 97, § 3.

of an undivided interest are under some legal disability and cannot therefore join in a voluntary amicable partition. The cases are as follows:

§ **158.** In Wilson's Estate,[4] there was a petition presented for the sale of real estate by certain trustees and a guardian, setting forth that the petitioners were seized, as trustees, as tenants in common of certain undivided interests, and they desired to make an amicable partition, and to that end proposed to join in one conveyance to a trustee who would then convey back to the various parties the several purparts agreed upon. The case was referred to an examiner, who said that the court had no jurisdiction under the Act of 1853 to entertain the prayer of the petition, the jurisdiction being confined to the case where it was necessary to perfect partition, i. e., where proceedings in partition had been commenced and for some reason defectively exercised, and to the case where it appeared that the real estate could not be divided without prejudice to the interests of the owners, etc. The Master's opinion was adopted by the court without comment.

§ **159.** In Hirsh's Estate,[5] the testator by his will gave the remainder of his estate upon certain trusts, and at the time of his death was seized of a certain undivided interest in real estate. An amicable partition was agreed upon between the parties, and the trustees under the will accepted one of the purparts and presented a petition for leave to make and execute the proper deeds in settlement, and the court held that there was ample jurisdiction under the Act of 1853 to entertain the petition; that the word "perfect" did not imply they could only act in cases where partition had already been begun because the court had that power in those cases before the passage of the act,[6] and the preamble clearly shows that it was passed to effect free alienation of estates, and it was obviously its intention to enable the parties to avoid the expense and delay of partition proceedings; that Wilson's Estate,[7] was so meagrely reported that it was of no value as an authority, and the prayer of the petition was granted.

(4) 2 W. N. C. 631 (1876).

(5) 17 W. N. C. 28 (1885), s. c. 17 Phila. 512, 42 L. I. 454.

(6) Overlooking in this the difficulty which then existed in the case of partition proceedings in equity. See § 156, ante.

(7) 2 W. N. C. 631 (1876).

§ **160.** In Thomas's Estate,[8] a mutual sale and exchange of the interests of tenants in common was approved. It was practically a case of partition.

§ **161.** In Hunsworth's Estate,[9] the testator directed his executors to divide his residuary estate into two parts, each of which he gave to certain life tenants with contingent remainders over. The two life tenants made a partition of the real estate, and the petition was filed under the Act of 1853(it does not appear by whom) to, as stated by the learned judge, "effect the division of the estate and bar contingent remainders so each half should be free from the remaindermen of the other half." A decree was made confirming the division of the estate as prayed for, with the approval of a trustee to be appointed to represent certain possible unborn children, contingent remaindermen.

The circumstance that there is an undivided interest does not of itself authorize a sale under the act. Each tenant in common may sell separately, and a guardian of the minor co-tenant may proceed under the act. The co-tenant sui juris cannot compel a sale of the other interests under the act. The remedy is in partition. See remarks of Clark, J., in Spencer v. Jennings.[10]

Conclusion as to Jurisdiction in Case of Amicable Partition.

§ **162.** It seems clear, therefore, that in any case where there is a legal disability on the part of any one or more co-owners, the proper court may authorize them to make or join in partition, and in every case where any of the defects in title mentioned in the act prevent the consummation of a partition, the jurisdiction under the act may be exercised, the disability removed and the partition perfected. It seems, therefore, as if the Act of May 23, 1913,[11] authorizing the guardian of minors upon approval of the court to join in partition is merely the duplication of one of the provisions of the Price Act.

Amount of Security in Partition.

§ **163.** The amount of security to be given in these cases will be subject to somewhat different considerations than in the case

(8) 11 D. R. 290 (1902).
(9) 22 D. R. 544 (1913).
(10) 123 Pa. 184 (1888) at 195-196. See § 22, ante.
(11) P. L. 345.

of a sale or a mortgage. Where money passes as part of the division, security should be ordered in double the amount but where no cash is paid, there seems to be no necessity for the party joining in the partition to give substantial security because he merely receives in substitution for an undivided interest in certain properties an entire interest in another property. Security here, if entered at all, should be merely a nominal amount; perhaps the bond of the party joining in the partition would be sufficient.

CHAPTER 10.

Cemeteries and Burial Grounds.

Price Act seems to provide for all cases ..... § 165
Other legislation concerning cemeteries ..... § 166
Conclusion as to cemeteries ..... § 167
The petition ..... § 168

Price Act seems to Provide for all Cases.

§ **165.** Land may be conveyed in trust for a cemetery or burial ground, or the use as a cemetery or burial ground may be fixed on the land by way of a modification of the fee. Land may also be conveyed to a church or duly incorporated cemetery company, and the burial use fastened upon it by the charter. The act seems to provide for the sale, etc., of the land in all cases where there is a trust under the clauses relating to trusts.[1]

Where there is a modification of the fee under the clause relating to land conveyed for special or limited purposes,[2] or where there is a corporate charter under the clause relating to corporations.[3]

Other Legislation Concerning Cemeteries.

§ **166.** The courts[1] authorized by existing laws to decree sale and conveyance of real estate may[4] order and decree a private sale of a portion of the real estate held by trustees of religious societies, congregations or church organizations, to an association or corporation for the exclusive purpose of a cemetery or place of sepulchre for the dead. Trustees, etc., of a church, etc., owning real estate used as a burial ground may sell the same by proceedings in the Common Pleas.[5]

(1) See § 134, ante. For a case of a sale of land in Philadelphia devised in trust for a burial ground where the interments had been stopped by the board of health, see Young's Est., 224 Pa. 570 (1909). The surplus proceeds, after providing for the removal of the bodies, was distributed among the heirs of the testator.

(2) See § 129, ante.

(3) See § 83, ante. For an instance of this, see Funck's Est., 16 Super. Court, 434 (1901).

(4) By Act of March 24, 1877, P. L. 39, Sec. 1, notice to be given to all parties interested as the court shall direct, and deed to be acknowledged as required by existing laws.

(5) Act of May 23, 1887, P. L. 168.

Any incorporated or unincorporated church, cemetery or burial association may, when for certain reasons desirable to change the location, purchase ground in the vicinity, remove the dead, and sell in fee simple the old cemetery grounds. Proceedings for the removal of the dead to be in the court of quarter sessions.[6] The court of quarter sessions has jurisdiction, where burial grounds are vested in trustees of any church or religious society, to direct removal of the dead and sale of the ground.[7]

A borough having title to a burial ground may, upon petition of the lot holders, transfer the same and the control to an incorporated cemetery.[8]

Conclusion as to Cemeteries.

§ **167.** We may therefore conclude that there is ample jurisdiction under the Price Act to make a sale, etc., of any ground used as a cemetery, and that there are a number of other acts duplicating the provisions of the Price Act. Since, however, these other acts are confined to certain specific cases, it may sometimes be desirable to proceed under the Price Act which seems to cover every case.

The Petition.

§ **168.** The petition should be presented by the holder of the legal title to the burial ground, church, cemetery or trustees, as the case may be. It is probable also that a lotholder in a cemetery would be a person in interest and entitled to present a petition. It is possible also that a relative of a person buried in the cemetery would have sufficient interest to present a petition. The amount of interest here, however, is so slight that no statement can be made as to whether it is sufficient to sustain the petition. When the property is sold, the purchase money should, of course, be held for the same uses and trusts as the land was before and paid out under the order of the court.

(6) See Act May 26, 1891, P. L. 118, as amended by Act of June 6, 1893, P. L. 325, as amended by Act of June 7, 1895, P. L. 181. Confer, similar Act of June 25, 1913, P. L. 551.

(7) Act May 19, 1874, P. L. 208, supplemented by Act of May 13, 1876, P. L. 159, supplemented by Act of April 18, 1877, P. L. 54, supplemented by Act of May 12, 1887, P. L. 96, supplemented by Act of June 16, 1891, P. L. 310, amended as to Secs. 1 and 2 by Act April 29, 1909, P. L. 291.

(8) Act of April 23, 1909, P. L. 155.

CHAPTER 11.

Persons Absent and Unheard from for More than Seven Years.

Preliminary ..... § 169
Provisions of the act ..... § 170
The circumstances from which the law will presume decease ... § 171
Notice to the absent one ..... § 172
The petition ..... § 173
Act of 1913 ..... § 174

Preliminary.

§ **169.** The case where the owner of land drops out of sight and is never heard of again frequently causes great difficulty. Such an occurrence will leave the title to the land in a very unsatisfactory condition and when the absent person holds in common will often inflict great inconvenience on the other tenants in common. The common law rule was that a person was presumed to be deceased if he was absent and unheard of for more than seven years. A title resting on such a presumption, without something on the record to show that the presumption had been made out, would hardly be worth buying. It is very important, therefore, in the interests of free alienation of property, that the case be provided for in some way by a statute which would effectually guard the right of the absent one and, at the same time, enable the property to be disposed of.[1]

Provisions of the Act.

§ **170.** The act provides that in those cases where "the owner of real estate may have been absent and unheard from for seven years, under those circumstances from which the law would pre-

(1) The administration and distribution of personal property in such case is provided for by the Act of June 24, 1885, P. L. 155, supplemented by the Act of May 28, 1913, P. L. 373. For a discussion of these statutes, the public policy involved and the constitutionality thereof, see Cunnius v. School District, 198 U. S. 458 (1905), 25 Sup. Ct. Rep. 721, 49 L. ed. 1125, affirming 206 Pa. 469, which reversed 21 Sup. Ct. 340, s. c. 25 Pa. C. C. 17. See discussion of this case, Gest on Drawing Wills and Settlement of Estates in Penna. (1909), p. 78, et seq.

sume his or her death,"[2] the disposition authorized may be made. This clause provides that where the court is satisfied that the presumption has been made out, a sale, etc., may be decreed, security being entered to protect the interests of the absent owner.[3] The doubt as to the constitutionality of this proviso has already been referred to.[3a] We shall now assume that it is constitutional.

The Circumstances from which the Law will Presume Decease.

§ **171.** These circumstances are an unexplained absence. If there is no reason why the absent owner should have gone away or failed to communicate with his family or friends, the circumstances exist under which the law will presume his decease. If on the other hand, it appears that there are reasons why he should have gone away, or why he should have remained away without communicating with his family or friends, the circumstances are such that the law will not presume his decease. Thus, if an individual leaves the jurisdiction under accusation of a crime, there is ample reason for his going away, and under such circumstances the law will not presume his decease.

Notice to the Absent One.

§ **172.** Furthermore, some effort must be made to locate and communicate with the absent owner. This is generally done by inserting an advertisement in papers which he might be likely to see, supplementing by such personal inquiries as may be thought advisable. The question of what effort must be made depends entirely on the circumstances of each particular case and the

(2) The time of the presumed death is at the expiration of the seven years, probably from the date last heard from. Freeman's Est., 18 D. R. 194 (1909). The circumstances may indicate that death occurred earlier, Harmstead's Est., 18 D. R. 786 (1909).

(3) For a case where a sale was authorized, see Freker v. Berg, 193 Pa. 442 (1899); in this case a non-resident heir had been absent for thirteen years, and service upon him or his next of kin was made by advertisement, as required by the court. The petition was by executor and the sale by him under a power. It was not clear what interest the non-resident had. Query: Why did not the executor sell under the power without an order of court? In Charlton's Est., 12 Phila. 102 (1878), s. c. 35 L. I. 194, one tenant in common apparently had a sale confirmed, the other tenant in common being absent and unheard of for seven years.

(3a) See 11, ante.

length of the absence and will be governed largely by such orders as the court may make relative thereto.[6]

It seems under the case of Cunnius v. School District,[6a] that the advertisement should be addressed to the absent person and perchance that he is deceased, to his heirs and devisees, otherwise should it subsequently appear that he was deceased at the time of the advertisement, there would have been no notice to the heirs or devisees, who would then have been the owners.[7]

Notice to the heirs is not essential although it is desirable to have them, or as many of them as can be reasonably communicated with, join in the petition merely as persuasive evidence of the propriety of the sale. The jurisdiction under the act is based on the presumption of death, and although the presumption may be that the death occurred many years beofre, where the proceedings are taken a considerable time after the lapse of the seven years, yet the title to the premises in question remains in the absent one until the deed is delivered in the proceedings under the act.[8]

Petition.

§ 173. The petition should be presented by the person who would inherit the property, or where there is an undivided in-

(6) In Ulrich's Est., 14 Phila. 243 (1880), s. c. 38 L. I. 5, the report was referred back to the examiner to take further testimony. The court, Hanna, P. J., said that it was not enough to show that the person in question had left and not been heard from, but that the testimony must go further and show that some attempt had been made to find him and communicate with him at the place he was believed or known to have gone. In Taylor v. Hoyt, 15 Atl. Rep. 892 (1882), s. c. 2 Mona. 206, one heir presented a petition for authorization of a sale without notice to the absent one. There was no attempt made to notify him and no notice by publication, and it was held that the title of the purchaser under the sale authorized would not avail him as against the absent person in an action of ejectment. The case is rather blindly reported, and it is difficult to tell just what the facts were. It was argued in this case that no attempt need be made to notify the absentee because the law presumes him dead by his absence. The act says, however, "absence for seven years under circumstances from which the law will presume decease," and those circumstances apparently are something more than a mere absence.

(6a) 198 U. S. 458 (1905), 25 Sup. Ct. Rep. 721, 49 L. ed. 1125, affirming 206 Pa. 469, which reversed 21 Sup. Ct. 340.

(7) For this suggestion, I am indebted to my learned friend, T. W. Jopson, Esq., of the Philadelphia Bar.

(8) See § 225 post.

terest by some one or all of the other tenants in common. Security must be entered and the court will in due course, after sufficient time has elapsed, depending on the circumstances of the case, order a distribution of the purchase money. Since the Price Act provides that the purchase money shall be held for the same interests as were divested from the land by the proceedings under the act, it follows that the purchase money must be held only for the absent one or his heirs or devisees. If it is distributed at all in his absence, it is probably to be distributed under the Act of June 24, 1885.[8a]

Act of May 28, 1913.

§ **174.** It is provided by the Act of May 28, 1913,[9] that in the case where the owner of property, has been absent more than seven years, the court may upon proceedings as therein provided, enter a decree that the presumption of the death of the person has been established, whereupon the real estate of the absent person shall devolve as if he had actually died intestate, and that the decree shall be recorded in the office of the recorder of deeds of the proper county; security to be given as required by the court. It is difficult to see what this act is intended to cover and there is grave doubt as to its constitutionality. It provides for the case where the owner of the entire interest in the property is absent and unheard of, and his heirs wish to take possession of the property and enjoy the fruits of ownership. Where there is an undivided interest, the other tenants in common may receive the rents, and there does not seem to be the same necessity for such legislation.

(8a) P. L. 155, as supplemented by the Act of June 28, 1913, P. L. 373.
(9) P. L. 369.

CHAPTER 12.

Security.

Preliminary, provisions of the act ..... § 177
Cases where bond is required ..... § 178
Amount of the bond ..... § 179
Sureties on the bond ..... § 180
Cost of obtaining security ..... § 181
Time of filing bond ..... § 182
Necessity of filing ..... § 183
Guardian's security where land lies in another county ..... § 184
Where party making sale resides in one county and land is in another ..... § 185

Provisions of the Act as to Security.

§ **177.** The provisions of the act as to the giving of security are of vital importance. Several questions arise: (1) as to the amount of the bond, (2) as to the sureties, (3) as to the time of filing, (4) as to the necessity of filing.[1]

Cases Where the Bond is Required.

§ **178.** The bond is expressly required by the provisions of Sections 4 and 10 of the act to be filed in all cases of a sale or

(1) The provisions of the act are as follows:

"Sec. 4. And Provided Further, That no sale or sales shall be ordered or made under the provisions of this act, in any case, until security, to be approved by the Court of Common Pleas or Orphans' Court, be given in at least double the value of the interest proposed to be sold."

"Sec. 6. . . . and before any decree shall be executed, the person or persons entrusted to execute the same, shall give adequate security to the commonwealth, to be approved by the court, conditioned for the faithful execution of the trust and proper application of all moneys to be received, according to the trust and decree of the court, which security shall enure to the benefit of all parties interested, and such security being so given, no purchaser or lessee shall be bound to see to the application of the purchase money or rents, or be in any manner liable to be affected by the former trusts or limitations upon the premises."

"Sec. 10. That the directions given in the sixth section of this act in regard to the security to be given in cases of sales, morgage, or letting of real estate, and the condition of the bond or security therein prescribed, shall apply to all cases of sales or mortgage, of real estate by order of the courts of this commonwealth."

mortgage, and by Section 6 it is provided that before any decree shall be executed, the person or persons, etc., shall give adequate security to the commonwealth. It is clear, therefore, that in every case of a sale, mortgage or conveyance on ground rent, there is a necessity of having a bond filed. In the case of a lease there is no special requirement for a bond except in so far as Sec. 6 requires a bond to be filed in all cases before the decree of the court can be executed. In many cases where a lease is authorized no security is practically necessary because the party holding the legal title either owns it, and is therefore entitled to the rents, or has already given security.

It is provided in Section 7 that the court may authorize conveyances to square and adjust lines between adjoining owners, perfect partition and authorize the purchase of adjoining real estate or the purchase of real estate to protect any security or rent held on property exposed to judicial sale under the decree as aforesaid, and with like effect and indemnity to them in acting thereunder, which perhaps means that in these cases a bond also should be filed. There does not seem to be any necessity, however, for a bond to be filed in case of partition of real estate except to cover owelty or in the case of squaring and adjusting lines, or in the case of a purchase of real estate, and the practice seems to be not to require a bond in these cases.

The Act of April 18, 1864,[2] provides that conveyances may be made to change in part or in whole the route or location of any right of way or passage existing over and upon adjoining and other lands, and that it is to be in the discretion of the court whether to require security in any such case. This provision seems very clear and it is not probable that in a case of this kind the court would require any security at all.[3]

Amount of the Bond.

§ **179.** The provisions of the act as to the amount of security required, are conflicting. Sec. 4 provides for security in at least

(2) P. L. 462, Sec. 1.

(3) The Act of Feb. 24, 1834, P. L. 70, Sec. 43, provides that no executor or administrator shall have power to execute a decree of the Orphans' Court for sale of real estate without giving security to the Orphans' Court having jurisdiction of his accounts. The provisions of the Price Act seem to be partially a re-enactment of this statute. This act does not fix the amount of the security as the Price Act does.

double the value of the interest to be sold, and Sec. 6 provides for the giving of adequate security. It has been decided that the security need not necessarily be in double the amount of the sale, but that the court may order more than double the amount, in its discretion.[4]

The purchase price is almost universally regarded as fixing the value of the interest for the purpose of determining the amount of the security. Judges will sometimes order security in less than double the amount, and a purchaser, out of a superabundance of caution, may sometimes object. The decree may easily be amended in such a case so as to increase the security to the amount required. Perhaps the best general rule is to always fix the security in double the amount, and if the circumstances of the case so require, the amount may be increased beyond that sum. Some counsel leave the amount of the security blank in the decree so the judge may fill in the amount. There is no objection to filling in double the amount in preparing the decree in all cases and this will save the judge some trouble in filling up the decree. The amount of the security can always be calculated because the amount of the purchase price must always be certain and set out in the petition. Some counsel merely insert in the decree "Security in double the amount." This is a very loose practice and not to be sanctioned. The decree should read "Security in the sum of dollars," and the amount of the security could be actually set out in figures so there may be no controversy about it.

Where the interest is undivided, the amount of the bond should only cover the undivided interest in the purchase money and not the whole amount received for the property.

Sureties on the Bond.

§ 180. The act makes no requirement as to the number and character of the sureties, which is regulated generally by the discretion of the court. Corporate security is usually regulated under rules of court, and where individual surety is offered they must qualify as to responsibility under the rules of the court.

Exceptional cases may perhaps arise where the court will dispense with sureties altogether and accept the bond of the party

(4) Thorn's App., 35 Pa. 47 (1860). Price on The Act for the Sale of Real Estate, (1874) p. 139.

authorized to act. Thus, where there is a perpetual trust for a charity, and the cestui que trust is a charitable corporation the court may, with the consent of the cestui que trust, authorize the trustees of the property making the sale to file their own bond and accept that as sufficient security.

Where the disposition is made by a trust company, which has obtained the approval of the court to act as surety, the practice in Philadelphia County is to direct them to give their own bond in double the amount of the proceeds of the sale. In the case of an individual, where the cash received is merely nominal, or where all parties in interest are sui juris and agree, a bond without sureties will be proper. It sometimes happens that a guardian will join in the sale where the undivided interest of a minor is an infinitesimal amount, sometimes so small that it will be entirely consumed to pay the costs of the proceedings. There is, in such case, no reason to require any sureties, and the bond of the guardian may be accepted as sufficient. This part of the act, giving discretion to the court in the matter of security, it a very wise provision and assists materially in the practical application of the statute.

Cost of Obtaining Security.

§ **181.** The cost of obtaining security may be credited in the account as a charge against the fund under the provisions of the act of June 24, 1895.[5]

A number of questions arise frequently as to the rights of the parties interested in the fund to proceed against the sureties on the bond. The law as to this does not depend on any principles peculiar to the Price Act, and therefore we will not consider them at all. A few cases are collected in the note.[5a]

(5) P. L. 248, Constitutionality affirmed in Clark's Est., 195 Pa. 520 (1900), reversing 10 Super. Ct. 423, which affirmed 7 D. R. 9 (1897), s. c. 20 Pa. C. C. 439.

(5a) Commonwealth v. McDonald, 170 Pa. 221 (1895); Stewart v. Moody, 4 Watts 169 (1835); Sawyers v. Hicks, 6 Watts 76 (1837); Commonwealth v. McGovern, 4 Super. Ct. 598 (1897); Commonwealth v. Winters, 4 W. N. C. 346 (1877), s. c. 12 Phila. 226, 34 L. I. 338; Commonwealth v. Hilgert, 55 Pa. 236 (1867); Miles v. Commonwealth, 2 Walk. 64 (1884); Commonwealth v. American Bonding Co., 25 Super. Ct. 145 (1904); Commonwealth v. Trust Co., 16 Super. Ct. 570 (1901); Commonwealth v. Messinger, 237 Pa. 1 (1912); Commonwealth v. Magee, 24 Super. Ct. 329 (1904).

Time of Filing Bond.

§ **182.** Notwithstanding the words of the act, "No sale shall be ordered or made until security be given," it is sufficient if the bond is filed at any time before the confirmation of the sale.[6] Where the practice is[7] to make the decree read that the sale is confirmed upon giving security, the giving of security fulfills the condition, and the sale becomes immediately confirmed without any further action of the court, except such action of approving the surety as may be necessary.

Where the record shows that the bond has been approved by two associate judges and filed, no further evidence is necessary, and parol evidence that it was not so approved is inadmissible to contradict the record.[8]

As to the Necessity of Filing Bond.

§ **183.** It was held that the provisions as to giving security contained in some of the earlier acts were merely declatory, and the filing was not essential when the court confirmed the sale,[9] and that the omission of the bond could only be set up upon appeal from the decree and not in a collateral action. Thus, in the case of Dixey's Excrs. v. Lanning and Sill,[10] there was a sale to the plaintiff by the administrator for the payment of debts under the Act of 1832. The administrator, however, did not give

(6) Greenwalt's App., 37 Pa. 95 (1860); Thorn's App., 35 Pa. 47 (1860). Purchaser excepted to the confirmation of the sale on the ground that the security was not filed before the sale was ordered or made, which exceptions were overruled, and decree made that the sale be confirmed on the filing of security. Brook's Est., 3 Phila. 516, s. c. 16 L. I. 372 (1859).

(7) As in Philadelphia County.

(8) Leedom v. Lombaert, 80 Pa. 381 (1876).

(9) In Lockhart v. John, 7 Pa. 137 (1847), a sale was made and confirmed without security, and it was held that the Orphans' Court could not five years later set aside the first sale because no security given, and divest the title of the purchaser as against purchaser at second sale properly confirmed. The action was ejectment by the second purchaser against the first. So also in Potts v. Wright, (1876) 82 Pa. 498, s. c. 34 L. I. 148, 24 Pitts. L. J. 125, 5 L. Times O. S. 35, 9 Lanc. Bar 14, the decree was held valid in an action of ejectment by purchaser at the administrator's sale for payment of debts notwithstanding the failure to file a bond.

(10) 49 Pa. 143 (1856).

the security which was ordered by the court, although sale was confirmed apparently in the same decree which ordered the sale. The subject of the sale was a ground rent, and the owner of the ground, it was held, could not set up the failure to give bond as a defect in the plaintiff's title which would prevent the latter from recovering the ground rent.

It has not been decided whether the filing of the bond is necessary under the provisions of the Act of 1853. The language of Kennedy, P. J., in the court below, in Kreimendahl v. Neuhauser,[12] seems to countenance the doctrine that if the court confirms the sale, the giving of security is not essential to the validity of the title of the purchaser.

It may, however, be strictly argued that the giving of security is essential in all cases where there are interests to protect, because those interests have been divested of their grasp of the land by the proceedings under the act, and unless they are given some substantial equivalent for the land, there is room to doubt the constitutionality of the act. The court, therefore, must see that there shall be sufficient security given so that the entire purchase money will, beyond a doubt, be forthcoming at the proper time.

It would be very unsafe to take a title under proceedings under the act unless a bond has been filed, and the better practice is to see that the bond has been filed before paying the purchase money. The general practice is, where a sale is confirmed, for the court to confirm upon security being filed. Filing the security therefore, is necessary to the taking effect of the decree, and this obviates any question as to whether the filing is necessary. It is clear that in the case of a private sale the security must be filed or the lien of debts of a decedent not of record will not be discharged.[13]

The act in Sec. 6. provides that such security being so given, no purchaser or lessee shall be bound to see to the application of the purchase money or rents, or be in any manner liable to or affected by the former trusts or limitations upon the prem-

(12) 13 Super. Ct. 606 at 609 (1900). This was a case of an action of ejectment against the purchaser, the sale not being confirmed. Judgment was entered for the plaintiff. See § 248, post.

(13) See Act of March 23, 1867, P. L. 43, Sec. 2.

ises.[13a] It seems clear, therefore, that even if the title will pass without a bond being filed, the purchaser will in such case be bound to see to the application of the purchase money.

If no bond is filed and the sale is unconfirmed, no title will pass by the deed.

In Kreimendahl v. Neuhauser,[14] there was an order confirming a private sale upon security being entered. The security was never entered, and it was held there was no decree of confirmation. The court below said that security must be entered and a report that it had been done made with the return of sale. The language of Kennedy, J., in the court below, must be confined to the case of a sale, public or private, upon a previous order, and the learned judge may have so intended. Is not applicable to the case of a confirmation of an already completed sale. It is the duty of the court to order security when required by the parties and failure to do so will be ground for reversal on appeal. No purchaser can be compelled to take title where no bond has been filed, even if the sale is confirmed. In all cases where the court confirms the sale already made, the better practice is to make the decree recite that the sale is confirmed upon security being entered in such a sum. The decree is then of no effect until the security is entered. It behooves the purchaser in all such cases to see that the bond has in fact been entered before paying the purchase money and accepting the deed. It is better conveyancing to recite in the deed the fact that security has been entered.

Guardian's Security Where Land Lies in Another County.

§ 184. There is a special provision as to security by the guardian in Section 3,[15] under which clause it is clear that the court of the jurisdiction over the land need not order security if the

(13a) Price on The Act for the Sale of Real Estate, (1874) p. 137.

(14) 13 Super. Ct. 606 (1900).

(15) The provision is as follows: "That in case of the appointment of a guardian by the court, and the payment over of money to him or of the payment of money to any former guardian, the court shall take adequate security for the faithful application of such money, and before the payment of any money to any guardian not within the court's jurisdiction, the court shall be duly notified that adequate security has been given to the court having jurisdiction over him, whether within or without this commonwealth.

court appointing the guardian has required sufficient security and due notice thereof has been given to the court ordering the sale.

Where Party Making Sale Resides in One County and Land is in Another.

§ 185. Where the party who is to give security and execute the deed lives in one county and the land lies in another county, the security may be entered and approved in the court of the county where the party lives,[16] and upon such approval being made, a certificate thereof shall be forwarded to the court of the county where the lands lie, and such certificate shall be sufficient security as if it had been filed and approved directly in the court making the decree of sale. This provision is a very wise one because the question of personal responsibility and the qualification of sureties is a matter which can be best determined by the court having jurisdiction over the parties, and an opportunity should be given to responsible persons to qualify in their own court and not run the risk of being refused in the court of a distant county where they are not known.[17]

(16) The Act of March 23, 1867, P. L. 43, Sec. 2, supplementary to the Price Act, provides "the security required by said act may be approved by the proper court of like jurisdiction of the county in which the grantor or one of them is resident, and be certified under the seal of such court to that wherein the sale was decreed, and such certificate shall be copied on the records thereof."

(17) See § 16, ante.

CHAPTER 13.

Purchase Money.

Purchase money takes the place of land sold ..... § 187
Account of proceeds ..... § 188
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Preliminary, provisions of the act ..... § 189
As to interest of a minor, etc. ..... § 190
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Purchase Money Takes the Place of Land Sold.

§ **187.** The purchase money takes the place of the land sold in all respects, and upon this circumstance the constitutionality of the fact to a large extent depends.[1] All interests in the land and limitations thereof take effect upon and apply to the purchase

(1) The act provides in Sec. 6 as follows: That the purchase money, or mortgage money, ground or other rent reserved, shall in all respects be substituted for the real estate sold, mortgaged or let, as regards the enjoyment and ownership thereof, after the payment of liens, and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest, present or future, vested, contingent, or executory, as the real estate sold, mortgaged, or let, had been held, except only such remainders, after an entailment or contingent remainders as shall have been bared or defeated as aforesaid, and those entitled to a present interest in such real estate, shall receive the interest of the proceeds or rents thereof, unless expressly directed to accumulate: Provided, That no principal moneys raised by sale or mortgage, as aforesaid, shall be expended for any other purpose than for the payment of liens upon or the improvement of the same real estate when mortgaged, or other real estate when held for the same uses and persons, unless the same be required for the maintenance and education of parties having the like interest vested or expectant, and can be equally and equitably so applied, and without diminution of the capital that may of right become the property of parties having unbarred interests or title in remainder or by executory devise, and it shall be the duty of the court to decree the proper application of all purchase or mortgage moneys and rents, which the aid of an auditor, when deemed necessary, to the discharge of liens and to parties interested, as and when they may be entitled.

money in the same manner and to the same extent as they did to the land which was sold.[2] Thus, where property is sold under the act, the question of the conflicting rights of the parties entitled under the limitations will not be permitted to interfere with the sale.[3] And where all the interests in the land are acquired by one person, and the trust limited comes to an end, he is entitled to have the fund in the hands of the trustees paid over to him.[4]

Where the sale is by trustees, the proceeds of the sale are to be invested on the same trusts as the land which was sold.[5] In ordering a sale under the act the court may direct the purchase money to remain charged on the premises for the benefit of the widow during life.[6]

It must be remembered that where the cestui que trust has a claim upon a title which is sold, he may follow the title and as-

(2) The special case of a contingent remainder is discussed, § 97 ante. Where the guardian of a minor sells his ward's interest at private sale and the land is subject to the lien of debts of the ward's father not of record, the guardian must pay the proceeds of the sale to the administrator of the father for distribution to the creditors, Yard's Est., 15 W. N. C. 422 (1885), s. c. 17 Phila. 436, 42 L. I. 17. Blake's Est., 134 Pa. 240 (1890) was a case of a distribution of the proceeds of real estate sold under the Price Act, and illustrates the principle that the proceeds are to be disposed of the same as the land. The controversy was over the order of payment of debts and legacies. Fulton's Est., 51 Pitts. L. J. 257 (1904); Foster's App., 74 Pa. 391 (1874).

(3) Goddard's Est., 198 Pa. 454 (1901), affirm. 9 D. R. 703 (1909), party objecting to sale set up the invalidity of an appointment; it was held the question was premature as it could be settled on the distribution of the proceeds.

(4) Owens' Est., 15 Pa. C. C. 196 (1894), s. c. 3 D. R. 331; Brubaker's App., 65 Pa. 317 (1871). As to attachment of an interest in the purchase money in the hands of the trustee, see Hoopes v. Price, 17 Phila. 98 (1884), s. c. 41 L. I. p. 114. In Hepburn's App., 65 Pa. 468 (1870), there was a married woman's trust of real estate created by deed. The trustees sold the property under order of the court, [the reporter in the syllabus says, under the Act of 1853] and the husband having died, she was entitled to terminate the trust in the proceeds the same as she would in the land, the court relying on the provision in the act to the effect that no change in the right of the cestui que trust shall result from any change in the nature of the property terminating the trust.

(5) Trust for burial ground, Funck's Est., 16 Super. Ct. 434 (1901) dictum.

(6) Helfrich v. Weaver, 61 Pa. 385 at 386 (1869).

sert his claim as against the purchaser unless the latter has bought for value without notice, in which case the equitable claim will be discharged and thrown upon the proceeds of the sale.[7] Thus the cestui que trust of the land standing in the name of the decedent and sold as his estate under the Act of 1853, may follow the proceeds and assert his claim thereto in the Orphans' Court which will have jurisdiction to determine the same.[8] The proceeds of a sale or mortgage are to be substituted for the real estate and can be applied to the payment of debts not of record only upon decree of the Orphans' Court having jurisdiction of the executor's or administrator's account, and upon it appearing that the personal estate is insufficient.[9]

Account of the Proceeds.

§ **188.** The person who has received the purchase money is bound to file an account at the proper time,[10] which account may be finally confirmed by consent of all parties in interest, or audited, if necessary. Where the property sold is part of a continuing trust, the proceeds are generally accounted for in the next account of the trustees, and it is not necesary to file a separate account unless specially directed by the court or the proceeds comprise the only fund of which there is to be an accounting.[11]

Where money arising from sale of land under the act has been awarded to the trustees for the widow of the testator for life,

(7) For a further discussion of this point, see § 222, post, as to title passed at the sale.

(8) McCarron's Est., 15 W. N. C. 485 (1884). In this case there was a petition for issue to the Common Pleas, which was refused. the court holding that the provisions of the Act of April 20, 1846, P. L. 411, Sec. 2, do not apply to a controversy over the proceeds of a sale under the Price Act.

(9) Trunkey, J., in Spencer v. Jennings, 114 Pa. 618 at 326 (1887), s. c. 19 W. N. C. 10, 44 L. I. 230, 34 Pitts. L. J. 243.

(10) The provisions of the act are as follows: Sec. 7. All persons entrusted with moneys raised under this act shall be authorized to file their accounts in the court whence their authority was derived, and upon such notice as the court may order to parties interested, or after being audited, if deemed necessary, or by consent of all parties interested, such accounts may be finally confirmed, and upon payment of the balance, as may be decreed by the court, such accountants may be fully discharged from the trust.

(11) In Blake's Est., 134 Pa. 240 (1890), there was apparently a separate account of only one fund.

and at her death to his children, the fund is to be accounted for by the trustees and not by the guardian, even though the same persons fill both offices.[12]

Provisions of the Act as to Devolution of the Purchase Money.

§ 189. A sale of real estate under judicial process necessarily and in fact changes the nature of the property from real estate to personal property.[13] The act, however, provides as follows: "And provided, that no purchase[14] or sale[15] by authority of this act, shall change the course of descent or transmission of any property changed in its nature by virtue thereof, as respects persons who are not of competent ability to dispose of it." The act, therefore, provides, that where there is in fact under its provisions a change from real estate to personal property, nevertheless the property shall be considered as of its original nature for certain purposes and as to certain persons.

Interest of a Minor.

§ 190. It is clear that where the minor dies under twenty-one, after the sale under the act, the proceeds devolve as if they were real estate.[16] The provisions of the act as to conversion only

(12) Carr's Est., 17 D. R. 297 (1908). See also McClurg's Est., 4 D. R. 655 (1895).

(13) This subject has been discussed. See article Equitable Conversion in Penna., 58 U. of P. Law Rev., p. 455.

(14) An investment in real estate under the Act of April 13, 1854, P. L. 368, Sec. 2, remains personal property, see Davis's App., 60 Pa. 118 (1869); Woodward's App., 38 Pa. 322 (1861).

(15) The words "lease, mortgage and conveyance on ground rent" are omitted from the act. See § 195, post, as to rents, § 194, post, as to mortgage money, and § 196, post, as to conveyance on ground rent.

(16) Holmes's App., 53 Pa. 339 (1867); Eckert's Est., 12 Phila. 93 (1878), s. c. 5 W. N. C. 451, 35 L. I. 193; Hough's Est., 3 D. R. 187 (1893); Murray's Est., 234 Pa. 520 (1912). In Belle v. Mateer's Est., 19 D. R. 929 (1910), the minor died after the sale under twenty-one, leaving a husband and an infant daughter who died three weeks later, and it was held that the proceeds remained real estate notwithstanding the second devolution, and were distributed as the real estate of the infant. In Ray's Est., 24 Pa. C. C. 366 (1899), s. c. 17 Montg. 15, 48 Pitts. L. J. (O. S.) 244, 14 York 145, a guardian sold real estate of his ward under the Price Act; the minor died and the guardian paid the money to the minor's administrator who accounted for it as money; the minor left a surviving husband and child; on distribution, the heirs claimed the estate as land; a judgment creditor of decedent claimed that it was personalty. Held

change the law in the case where the minor dies after the sale. Where he dies before the sale, he dies seized of real estate and the proceeds go to those entitled to the same at the time of his death, and hence apparently devolve as real estate. The provisions of the act in this respect are merely declatory of the existing law.[17]

that the estate was distributable as personalty to judgment creditors and heirs. Doty, P. J., relied on the circumstance that the money had been paid to the administrator. This case is obscurely reported, as it did not appear what creditor was claiming or whether the minor died over twenty-one. The payment by the guardian to the administrator would not divest the right of the husband of the child who could follow the fund into the hands of the administrator. The case appears to be open to objection and contrary to the weight of authority.

"And again, in the second proviso to the 7th section, the language is, 'that no purchase or sale by authority of this act shall change the course of descent, or transmission of any property changed in its nature, by virtue thereof as respects persons who are not of competent ability to dispose of it.' This provision is general, although it appears in a section relating principally to the powers of trustees, guardians, committees, married women and corporations. Strictly it is not a proviso to anything preceding it; it is an independent provision. which, by usage in our legislation, is often introduced by way of proviso. It is not possible to disregard these provisions in the act, and declare that notwithstanding the conversion of the minor's estate was complete under the act in his lifetime and at his death, it passed as personalty. The act does not mean this. The sale was not made for the purpose of raising money for him. Before making the order, the court were satisfied that the change from land to money substituted for the land, would be best for his interest, and it was that which moved the court to make the order. We must therefore hold that this change did not change the character in which the substitute is to pass to those entitled. It must pass as land: Greenawalt's App., 1 Wright 95. So thought the auditor and court.

"It seems to me, that the last clause in the second proviso to the 7th section, quoted above, is misunderstood by the learned counsel, if I understand them. They seem to read it as applying to the party claiming the descent, while it is quite manifest it only applies, in a case like this at least, to the party whose property has been changed by the sale. In other words, as Mrs. Holmes was competent to dispose of the substitute for the land, it seems to be thought that that part of the proviso has no application to the case. It is quite certain, however, that this is incorrect; its application is to the son whose estate was sold while he was a minor and incompetent to dispose of it. Had he been of age, he might have disposed of the proceeds as money and not land." Thompson, J., in Holmes's App., 53 Pa. 339 at 342 (1867).

(17) Confer Foster's App., 74 Pa. 391 at 399 (1874), which was a case

The proceeds of the sale of an absolute interest of a minor will be transmitted to the domciliary guardian notwithstanding the circumstance that if the minor dies under age, the proceeds will devolve as real estate upon persons resident in the county where the land lay, and they will therefore be under the necessity of prosecuting their claim in a foreign court. The court will, however, embody in the order for transmission a notice to the domiciliary court of the nature of the fund.[18]

Lunatics, Habitual Drunkards and Married Women.

§ **191.** No case has arisen as to the devolution of the proceeds of the sale of the interest of a lunatic, habitual drunkard or married woman. Since the act provides that no purchase or sale shall change the descent or transmission of property as respects persons who are not of competent ability to dispose of it, it seems clear that in these cases also the proceeds of the sale would devolve as real estate.[19]

So far as married women are concerned, we must remember that the law has changed since the Price Act has passed, and now under the married woman's property acts, a married woman has full power to dispose of her legal estate. The question will therefor arise whether the same rule is to be applied to her now as would have been applied to her when the act was passed. The disability imposed upon a married woman, however, with respect to her sole and separate use, still remains, and in such case it seems as if the provisions of the act should apply.

Effect of Sale upon Devolution of Proceeds of Owners Sui Juris.

§ **192.** The law probably is that where the owner of the property is sui juris, the sale under the act produces a conversion just as in any other case, the wording of the exception being apparently confined to the case of a minor or person under legal

of a sale of a decedent's interest in partnership real estate. See also Diller v. Young, 2 Yeates 261 (1797). Ferree v. Commonwealth, 8 S. & R. 312 (1822), where there was an order of sale in partition under which sale was made in 1809, and the heir died in 1807, and it was held that the proceeds were payable as if real estate.

(18) Gray's Est., 52 Pitts. L. J. 195 (1905). The case arose on a petition by the domiciliary guardian to have the fund transmitted to him.

(19) See Hirst's Est., 147 Pa. 319 (1892), semble, that the sale of an interest of a lunatic will not produce a conversion.

disability. The proceeds are therefore considered as personal estate, and are not the subject of lien, and can only be reached by attachment.[20]

Equitable Conversion.

§ **193.** Suppose the testator directs a sale in such terms as to effect an equitable conversion and the trustee sells the property under the Price Act, and there is a minor interested, and a question arises as to devolution of his interest if he dies after the sale. The question is whether the act will impress the character of real estate on the purchase money, to which the character of personal property has already been affixed by the directions of the testator. This question was raised but not decided in Murray's Estate,[21] and there does not seem to be any other case in which it has been referred to.

It seems clear that a prohibition of alienation imposed by a former owner of the title will not prevent the court from directing a sale under the provisions of the act.[21a] Since the act expressly provides in the cases specifically referred to that the proceeds of the sale shall be considered as real estate, it seems that upon the same principle a direction to convert would be unavailing as against the provisions of the act

Mortgage Money.

§ **194.** A mortgage being a pledge of the legal title, rests on different principles because the money borrowed must be repaid. It seems clear that the land devolves just as if the mortgage had never been created, and that the burden of paying it off falls upon whoever is the owner when the mortgage is due. It is therfore necessary to make an order where a mortgage is created, providing for an adjustment of the equities between the life tenant

(20) Dictum, Penrose, J., in Homer's Est., 20 Pa. C. C. 458 (1897) at 460, s. c. 7 D. R. 63, 15 Lanc. Law Rev. 335. In Weaver's Est., 2 Lanc. L. R. 114 (1884), the proceeds of a sale under the Act of 1853 were distributed as personalty to the legal representatives of a party in interest who died after the sale. It did not appear, however, whether the decedent was a minor; if so, decision is open to objection. The point was not discussed.

(21) 234 Pa. 520 (1912).

(21a) See § 38, ante.

and the remainderman,[22] which generally contemplates the creation of a sinking fund for the payment of the mortgage out of any increased rentals which may be derived from the land. Since no one is entitled to the proceeds of the mortgage, the same being necessarily spent either in the payment of debts or the improvement of the land, and the burden only of paying off the mortgage following the title, it seems clear that no question of conversion is presented in such a case.[23]

Rents.

§ **195.** Where property is leased, the rents belong to the owner of the property, and where the lease is made under the provisions of the Price Act, there does not seem to be any reason for a different rule. If a minor should die after a lease has been made, the rents would, of course, be paid to the persons upon whom the real estate of the minor would devolve because the property remains of the same nature as it was before. There does not seem to be any reason, therefore, to apply any particular rule to the case of the distribution of rentals arising from a lease made the provisions of the act.

Conveyance on Ground Rent.

§ **196.** The proceeds of a sale on a conveyance on ground rent are, it seems, personal property the same as in the case of an ordinary sale, and therefore subject to the same rule as heretofore noticed. The ground rent, however, is real property and will devolve as such, and in this case there seems to be no exception as to the case of a minor because the words of the act providing for the retention of the quality as real estate apply only to the proceeds of the sale, and a ground rent reserved cannot in any sense be said to be the proceeds of a sale, at least not until the ground rent is finally extinguished or sold.[24]

(22) See § 28, 45, ante.

(23) In Smith's Est., 53 Pitts. L. J. 136 (1905), a mortgage was made by a trustee under order of the Orphans' Court to raise money to construct a building on the premises. The property being subsequently sold at an increased price much greater than the cost of the building, there was no detriment to the remaindermen. and consequently rents which had been set aside as a sinking fund were directed to be paid to the life tenants.

(24) See language of Penrose, J., in Shephard's Est., 8 Pa. C. C. 520 at 522 (1890); Hirst's Est., 147 Pa. 319 (1892).

CHAPTER 14.

Title of the Purchaser.

Preliminary discussion of provisions of the act ..... § 197
Act presupposes a title to be sold ..... § 198
Provisions as to title to be read in connection with general principles affecting Orphans' Court sales ..... § 199

Preliminary Discussion of the Provisions of the Act.

§ **197.** The act provides that the title of the purchaser under such sale, mortgage, conveyance on ground rent shall be in fee simple, indefeasible by any person having a present or expectant interest therein, and unprejudiced by any error in the proceedings, and that by a public sale the premises shall be discharged from all liens. The provision is given in the note.[1]

It is to be observed that this clause only applies to a sale, mortgage and conveyance on ground rent, and omits any provision as to the other disposition of the title authorized, to-wit: exchange, lease, partition, adjusting and squaring lines, releasing a right of way over adjoining lands. In the case of a lease, of course there is not the same necessity for such a provision. A lessee, for instance, would not be affected by liens. In the other cases, there is, however, as much reason to protect the title acquired under the proceedings. No reason has been assigned for this omission from the act.

These clauses must be read in connection with and in subordination to the other provisions of the act. They do not mean, although standing by themselves they might be so construed, that the title is good against the world, but that the title is good as against the persons having an interest under the circumstances prescribed by the act, and whose interests are divested by the sale, etc., that is to say, any person under any of the disabilities mentioned in the act will be barred by appropriate pro-

(1) Sec. 5. That the title of purchasers under all such sales, mortgages, or conveyances upon ground rent, shall be a fee simple title, and indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings of the court, and by every such public sale the premises sold shall be discharged from all liens.

ceedings, and any person having an interest arising out of any of the defects in title mentioned in the act will in like manner be barred. Where, however, the proceedings cannot be brought within any of the cases provided for in the act, the court has no jurisdiction, its decree is void and confers no title, and the purchaser can be ejected from the premises by a party having the real interest.[2] The title is indefeasible only as against those persons who are within the divesting words of the act. As to all others, the proceedings under the act are null and void.

The indefeasibility as to such persons depends on the validity of the act in divesting their interests, and the validity of the act in this respect depends on certain general principles of constitutional law and public policy, which we have already referred to.[2a]

The act means that where the title vests under a will or deed, that it is indefeasible by those claiming under the will or deed, and where the title descends under the intestate laws, that it is indefeasible against those claiming under the decedent, and where there is an inherent defect in the title, as minority, lunacy, entails, that the title is cured of the defect.

Act Presupposes a Title to be Sold.

§ 198. The Act of 1853 presupposes a title to be sold, and when there is any controversy as to the existence of or the validity of the title, the act cannot be invoked to settle the controversy.

In Hower's Appeal,[3] the administrator petitioned for confirmation of a private sale made by the heirs because the estate was subject to the lien of judgments and other debts not of record. The petition was answered by parties claiming an interest in the land hostile to the intestate, and as there was, therefore, a dispute as to the title, the court declined to ratify the sale.[4]

In Burke's Estate,[5] there was a petition for the sale of minor's

(2) See Chapter 16 on Collateral Attack.

(2a) See introduction. See § 11, ante.

(3) 55 Pa. 337 (1867), as to the error in par. I of the syllabus, see § 117, ante.

(4) Where there is a doubt as to the title so that the property might be sacrificed, the court will upon petition vacate the order of sale, Moore's Est., 9 Phila. 326 (1873), s. c. 30 L. I. 176, 5 Leg. Gaz. 165; Bridesburg Land Co.'s Pet., 7 Phila. 436 (1870), s. c. 27 L. I. 317. See § 222, post, on title passed by the sale.

(5) 15 Pa. C. C. 9 (1894), s. c. 3 D. R. 384.

interest, and the court said that the question whether the title of the minor was good or bad was immaterial to be considered in the proceedings, that it was a question for the purchaser to consider.

The language of Penrose, J., in Corr's Est.,[6] that the act confers authority to decide every question, including that of title, affecting the rights of the parties having a present or expectant interest, is perhaps too broad and to be confined to the question of determining who have an interest and are to be joined.[7]

Provisions of the Act to be Read in Connection with General Principles Applicable to Orphans' Court Sales.

§ 199. These clauses in the act are, to a certain extent, merely declaratory of the existing law as to Orphans' Court sales, although they should undoubtedly be inserted in the averments of every petition and the provisions of every decree under the act.

While the same principles apply to a mortgage and a conveyance on ground rent, it must be remembered that they are only a species of alienation and governed by the same principles. Few cases have arisen as to them, and our reference to the cases will therefore be almost exclusively to the cases of a sale. Strictly speaking, there cannot be a title under the proceedings until the sale is confirmed, the deed delivered, and the purchase money paid.[8] The title of the purchaser may be drawn in question either by proceedings to set aside the sale or in a collateral proceeding. Until the title vests in the purchaser, all subsequent proceedings may be attacked on various grounds by the purchaser or any party interested. The true bearing of the provisions will be more apparent if we refer to some decisions on Orphans' Court sales in general in addition to those arising strictly under the act.

(6) 29 Pa. C. C. 276 at 277, 12 D. R. 788 (1903).

(7) Confer, Kline's App., 39 Pa. 463 (1861), where the property sold for the payment of debts was subject to a resulting trust but nevertheless the sale was confirmed as the sale was of the title of the decedent, and the cestui que trust could pursue his remedy against the purchaser at the sale. Objection was made by the cestui que trust and not by the purchaser, the latter asking to have the sale confirmed. See § 222, post, as to title passed by the sale.

(8) See § 225, post.

CHAPTER 15.

Orphans' Court Sales.

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Preliminary.

§ **200.** The jurisdiction under the Price Act is most frequently invoked for the authorization of a sale and generally by proceedings in the Orphans' Court. In the exercise of this jurisdiction, the court will follow the law generally applicable in such sales, and it is therefore useful to point out some of the principles governing Orphans' Court sales, and refer to some of the cases decided under other acts, but which are nevertheless in point when the proceeding is under the Price Act.

Nature of Orphans' Court Sale.

§ **201.** An Orphans' Court sale, it must be remembered, is a sale by the court, the party making the sale and delivering the deed being merely an agent,[1] and at all times subject to the control of the court which, in the exercise of its jurisdiction as a court of equity[2] will govern the proceedings to the end that justice may be done to all parties, and at the same time the various statutory requirements complied with. Indeed most of the jurisdiction conferred by the act is merely statutory enactment of the equitable jurisdiction generally exercised by the chancellor, consequently the general principles of equity will prevail.

Confirmation of Sale.

§ **202.** The confirmation of the sale is the final act of the court accepting the offer of the purchaser, and is therefore necessary to the validity of the title in all cases. Formerly, under some of the old acts, it was held that a sale would be valid even without such confirmation after fifteen years.[3] In such a case now the court would probably proceed to confirm the sale with notice to all parties, and if the case arose in a collateral proceeding, suspend judgment until the sale could be confirmed.[4]

(1) See remarks of Smith, P. J., in Ross's Est., 18 D. R. 429 (1908) at 431.

(2) See remarks of Lowrie, J., in Loomis v. Loomis, 27 Pa. 233 at 236 (1856), "And it (Orphans' Court) sits as a court of equity and in a rude way uses the forms of a court of equity when it orders land to be sold for the payment of debts."

(3) Watt v. Scott, 3 Watts 79 (1834). Ejectment.

(4) See Chap. 16 on Collateral Attack.

Jurisdiction of the Common Pleas Over Orphans' Court Sales.

§ **203.** It is clear under the statutes authorizing the Orphans' Court to make sales of real estate, that the sole jurisdiction to make the sale is in the Orphans' Court and that the Common Pleas have no jurisdiction over Orphans' Court sales. They may not entertain a bill to restrain an executor from selling under order of the Orphans' Court.[5] The Common Pleas may, however, restrain proceedings on a mortgage on the ground that the proceedings in the Orphans' Court authorizing the mortgage were invalid.[6] The decree of the Orphans' Court confirming the sale is conclusive on the Common Pleas,[7] which may, after the sale has been confirmed, entertain a bill in equity for specific performance,[8] or take jurisdiction of an action of assumpsit to recover the purchase money or render a decision upon a case stated to determine the marketability of the title.[10] The Orphans' Court may under its equity powers make a decree of specific performance against the purchaser at the sale.[11] This jurisdiction, however, is limited to the cases where the court has jurisdiction. Thus, if there are undivided interests in the property, and some of them are under age, and as to those a decree confirming the sale is made in the Orphans' Court, the Orphans' Court can only enforce specific performance of the contract of sale by the guardians, and if, therefore, the other undivided interests who are sui juris have joined in the contract of sale the remedy against the purchaser must be pursued in the Common Pleas, as a remedy is joint and cannot be severed by proceedings in the Orphans' Court as to some and proceedings in the Common Pleas as to others.[12]

(5) Loomis v. Loomis, 27 Pa. 233 (1856). The Common Pleas may, however, entertain a bill in equity as to a sale by an executor under a power in a will, McClane v. McClane, 207 Pa. 465 (1904).

(6) Morgan's App., 110 Pa. 271 (1885).

(7) Mercer Home, Fisher's App., 162 Pa. 232 (1894).

(8) Brock v. Steel Co., 203 Pa. 249 (1902). Common Pleas, however, has no jurisdiction for specific performance where the sale has not been confirmed, Mussleman's App., 65 Pa. 480 (1870); Bickley's Adm. v. Biddle, 33 Pa. 276 (1859).

(9) See § 220, post.

(10) See § 220, post.

(11) See § 220, post.

(12) Claypoole's Est., 15 Pa. C. C. 283 (1894), s. c. 3 D. R. 455.

Sales Under a Power to be Distinguished.

§ **204.** Where the sale is made by an executor or trustee under a power in the instrument creating the trust, the Orphans' Court, in the exercise of its general equity jurisdiction, may control the sale. The case, however, is not that of an Orphans' Court sale because the sale is made by the executor or trustee and not by the court. These cases, therefore, are to be distinguished and excluded from the discussion although sometimes governed by the same principles.[13]

Proceedings for Sale.

§ **205.** Proceedings in the Orphans' Court for the sale of real estate fall into two classes: (1) those where there is an application for an order of sale upon which an appropriate order is made followed by a sale, a return thereof to the court, confirmation of the sale followed by execution and delivery of the deed and payment of the purchase money; (2) Where the sale is made subject to the approval of the Orphans' Court and petition made for the confirmation of the sale already made, followed by decree of confirmation and consummation of the sale, as in the other cases. Either course may be adopted. The second method is the modern and more direct proceeding, and applies as well to a public as a private sale and secures the rights of all parties. All the questions which can be raised on the petition for an order or a return of sale can be raised as well on a petition for confirmation of a sale already made. Cases may arise, however, where it is advisable to petition for a preliminary order, as where the parties are not agreed, or there is some doubt as to the propriety of the sale. These questions can be settled on the presen-

(13) The following are cases of sale under a power: Cobleigh's Est., 23 Super. Ct. 271 (1903); Hancock's Est., 9 D. R. 231 (1900), s. c. 23 Pa. C. C. 592; Miller's App., 84 Pa. 391 (1877); McClane v. McClane, 207 Pa. 465 (1904); Reel's Pet., 32 Pa. C. C. 200 (1906); Morgan's Est., 9 Pa. C. C. 119 (1890); Rigg v. Schweitzer, 170 Pa. 549 (1895), s. c. 37 W. N. C. 152, was a case of a bill in equity in the Common Pleas to declare void a sale by an executor under a power on the ground that the executor had really bid on the property through an agent. The bill was dismissed as the grounds of allegation were not proved. Handbest's Est., 15 D. R. 234 (1906); Brittain's Est., 28 Super. Ct. 144 (1905); Barndt's Est., 23 D. R. 226 (1914).

tation of the petition and some unnecessary expense perhaps avoided.[14]

Order of Sale Controls Subsequent Proceedings.

§ **206.** In a case of a preliminary order for sale, the rights of the purchaser and the party making the sale are determined by the order of sale made by the court, which may not be varied without the consent of the court, but where there has been a variance in the subsequent proceedings, it will be cured by the decree confirming the sale. Any variance of the terms in the advertisement is unauthorized and will be of no effect except that the court may, in confirming the return of the sale in a proper case, accept the terms of the advertisement.[15]

Method of Objecting to the Sale.

§ **207.** The parties interested may object to the order of sale, file exceptions to the return, object to the confirmation, file excep-

(14) As to the jurisdiction of the Orphans' Court to ratify afterwards that which it might have confirmed in advance, see § 21, ante.

(15) In Jayne's Est., 2 W. N. C. 536 (1876), there was a petition of a purchaser to set aside the sale. The order of sale decreed that the premises should be sold subject to two certain mortgages. The advertisement was that the mortgages might remain. It was held that the purchaser was not entitled to relief as it was his duty to look to the order of sale and not to the advertisement.

In Jacobs' App., 23 Pa. 477 (1854), the administrator varied the terms of the sale prescribed by the Orphans' Court and the sale was confirmed as altered. The court said, however, that the confirmation would cure the variation, and then decided the case on the ground that the sale conferred no title because of the altered terms. In Backenstoss v. Stahler's Admrs., 33 Pa. 251 (1859), there was an administrator's sale in partition, and the conditions of the sale were that all grain except a certain amount should remain on the ground and be the property of the vendee. A verbal announcement was made at the sale that all the grain except every fourth bushel was reserved. The deed was made without reserving the growing crops, and the administrator brought trover against the purchaser and the court held that if the purchaser agreed to the verbal reservations, he was bound and judgment for the plaintiff was confirmed, going on the ground that the order of the court related exclusively to realty, and the reservation was to personalty and therefore outside the jurisdiction of the Orphans' Court order.

In Randolph's App., 5 Pa. 242 (1847), administrator altered the conditions of sale by agreeing to continue in force a lien which would otherwise have been discharged by the sale.

tions thereto, proceed to set aside a confirmation already made, and in exceptional cases proceed to set aside the sale even after the delivery of the deed and payment of the purchase money. The rights of the different parties at various stages of the proceedings must be considered. The parties interested are: the purchaser, the party making the sale, the persons interested in the estate, the title of which is sold, and the creditors, if any.

Where Court has no Jurisdiction.

§ **208.** Where the court has no jurisdiction to make the sale, the proceedings may be dismissed at any time on that circumstance being made to appear by proper proceedings by any party in interest.[16]

Dicta as to Orphans' Court Sales.

§ **209.** Where there is a controversy after the sale is completed over the proceeds of the sale, any remarks of the court as to the validity of the sale seem to be dicta, as the parties are estopped to question this validity so long as they claim the purchase money, and anyone not claiming can proceed to set aside the sale notwithstanding the remarks of the court.[17]

Statute of Frauds.

§ **210.** The statute of frauds does not apply to an Orphans'

(16) In Butt's Est., 20 Lanc. L. R. 41 (1902), a rule for an alias order of sale for the payment of debts was refused as the lien thereof had expired. In Kurtz's Est., 16 Lanc. L. R. 205 (1899), a petition to vacate an order to mortgage real estate for payment of debts was sustained and the order revoked and petition dismissed, as the lien of debts had expired. In Souder's Est., 20 Lanc. L. R. 231 (1903), exceptions were filed to proceedings for a sale of real estate, which were dismissed because not supported by affidavit or proof and not filed until after sale had been confirmed. The administrator had petitioned for a sale for payment of debts, the administrator having been appointed in Chester County. The court said that the Orphans' Court of Chester County had jurisdiction of the account and alone had power to determine the necessity of the sale, and that question could not be inquired into by the Court of Lancaster County where the land lay, and which must order a sale according to the decree of the court of Chester County.

(17) A few of these cases are as follows: Funston's Est., 24 Pa. C. C. 135 (1900); Yard's Est., 17 Phila. 436 (1885), s. c. 42 L. I. 17, 15 W. N. C. 422; Crosson's Est., 6 Pa. C. C. 14 (1888); Bindley's App., 69 Pa. 295 (1872).

Court sale, and the purchaser cannot set up in defence that the contract was not in writing when sued for the purchase money.[18]

Sale Must be for an Adequate Price.

§ **211.** Since the court makes the sale, it obviously has power to determine the price at which the property shall be sold, and to accept or reject any offers which are made. The controlling principle is that the price must be adequate, that is, must represent as nearly as possible, under the circumstances, the full value of the property. The court has in the exercise of its equitable jurisdiction power to make such orders and decrees as may be necessary to secure a sale at an adequate price.

Setting Aside for Inadequacy of Price.

§ **212.** Although there has been some doubt as to the power of the Orphans' Court to set aside a sale on the ground of inadequacy of price alone,[19] it is now clear that wherever it appears that the price is inadequate, the court will refuse to confirm the return, refuse to confirm the sale, or where the sale has been confirmed, open the confirmation and set aside the sale, provided the application is made in time.[20]

(18) King v. Gunnison, 4 Pa. 171 (1846). Although this case is generally cited as an authority for this proposition, it does not appear that the defendant set up the point in defence.

(19) See Ryan's Est., 8 Pitts. L. J. 25 (1860); Cromrath's Est., 1 Wood 103 (1862); Ringler's Est., 1 Wood 214 (1864).

(20) In these cases, before sale was confirmed, the court set it aside and ordered another sale: Hamilton's Est., 51 Pa. 58 (1865). In this case there was an administrator's sale in partition. The administrators and heirs made an arrangement for a higher bid, and the administrator in his return set out that the property could be sold for a higher price. One of the heirs formally notified the administrator that the price was too low and offered more. The court set aside the sale without notice to the purchaser and on an alias order the property was sold to another party at a higher price. The first purchaser petitioned to have the second sale set aside and the first sale confirmed. The petition was dismissed which was affirmed on appeal without deciding the right of a successful bidder to appeal from a decree of the court setting aside the sale and ordering another one. The purchaser stood in no relation of confidence and was not entitled to raise the question of lack of notice. In McCarroll's Est., 2 W. N. C. 248 (1876), there was a petition by administrator to set aside a sale, setting out that since the sale a higher offer had been made. The court made a decree that upon the offeror giving security to

Security for a Higher Bid on Re-Sale. Distinction Between Public and Private Sales.

§ **213.** The court may, however, in order to discourage frivolous objections, require some assurance that the property will

bid for and purchase the property at not less than a certain price, the sale would be set aside and an alias order of sale issued. In Brown's App., 68 Pa. 53 (1871), there was a private sale by an executor and trustee under the Price Act for $5,250. Petition one month later filed by executor and trustee setting out that an offer of $6,400 had been made, and that sale had not been consummated. A new order of sale was made authorizing the acceptance of the new bid on terms of reimbursing the former vendee for expenses incurred in becoming a purchaser. In Grew's Est., 14 D. R. 224 (1905), s. c. 31 Pa. C. C. 530, 6 Lack. Jur. 166, there was a petition by an heir to set aside sale in partition. At a former sale there was a bid of $425., subject to a ground rent, but no sale was effected and on the second sale the property was sold for $100. The petition was granted, bond having been filed. In Herr's Est., 12 Pa. C. C. 622 (1893), exceptions to confirmation of administrator's sale were filed by an heir on the ground of inadequacy of price. A bond was filed conditioned for an advance bid of 10% on re-sale. Sale was set aside and re-sale ordered. In McBride's Est., 23 Pa. C. C. 544 (1900), s. c. 9 D. R. 216, a petition for re-sale was filed apparently before confirmation, accompanied by a bond of proposed purchaser conditioned for a bid of over 10% advance. It did not appear who filed the petition. Re-sale was ordered. The court may refuse to confirm a particular sale. Thus, in Allen's Est., 11 Phila. 48 (1875), s. c. 32 L. I. 417, where a sale in partition had been made and the purchaser presented a petition to confirm the sale, the court refused to confirm and made an order and decree setting aside the sale, as it appeared that the sale was made at a grossly inadequate price. In Breil's App., 24 Pa. 511 (1855), an administrator's sale had been made and no terms of sale prescribed in the order. A decree was made confirming the sale on certain terms, although it appeared that the property was sold at 20% of its value. On appeal, the confirmation was set aside, the Supreme Court saying that the court could have approved the terms nunc pro tunc but could disapprove and refuse to confirm for that reason alone. As to the 10% in Phila. County, see McRee's Est., 6 Phila. 75 (1865), 22 L. I. 389, sale under proceedings in partition. Petition of purchaser for order on trustee to execute and deliver deed granted, although the property had increased in value since the sale; Scott's Est., 4 Phila. 178 (1860), 27 L. I. 4. In Murphy's Est., 15 Phila. 530 (1882), 39 L. I. 118, a petition was presented by a creditor to vacate decree of confirmation of sale of real estate, which petition was dismissed on the ground that the sum named by the petitioner as the purchase price was not in advance of ten per cent. over the former sale. Breese's Est., 2 Kulp 62 (1875), sale set aside, bond filed. Metz's Est., 14 York 136 (1900); Ranck's Est., 11 Lanc. L. R. 233 (1893), bond not in proper form. In these cases the court

bring more at the second sale, and the practice generally it to require security that the property will bring an advance of at least ten per cent. upon a resale.[21] This principle is equally applicable where the objection be made before or after the sale is confirmed. The purchaser at the sale which is set aside should be protected.[22]

A distinction is to be drawn here between the case of a public sale and the case of a private sale. Where a public sale is set aside and a new public sale ordered, it is obviously necessary to have some security that the bid will be forthcoming at the next sale, otherwise the property might bring a sum less than it brought at the first sale. Where, however, the sale is private, and the application is for confirmation of that sale, and an offer is made of a higher price for the property, the same considerations do not apply. Here the offer may be accepted at once if it is deemed advisable, and there seems to be no occasion for requiring any security. In such a case the court can make a decree

refused to interfere on the ground that the price was inadequate: Miller's Est., 5 Kulp 205 (1889); Wright's Est., 2 Kulp 442 (1878), exceptions to sale of real estate; no offer of a larger price. Forney's Est., 3 Kulp 29 (1883), exceptions to return of sale dismissed because exceptant failed to give security to pay the costs in case the property should bring less at a re-sale. In Carroll's Est., 2 Kulp 37 (1882), an application to set aside a sale was made (it did not appear by whom), which was refused, as there was no offer to return the deposit money or to bid more at a re-sale, and no security tendered to cover costs. In Funck's Est., 16 Super. C. 434 (1901), there was a petition of a trustee to sell land, joined in by all the heirs except two. The court made the decree awarding the sale. The objecting ones also made an offer to buy the property on certain terms which the court below rejected. It was held that the order of the court below would not be reviewed on appeal, as there was no abuse of discretion. In Clark's Est., 38 Pa. C. C. 302 (1911), the court found as a fact that the sale was made at a proper price ($2,300), mere offer of an unsuccessful bidder to bid $500 more on re-sale. Application was refused; and the first sale confirmed. In Snyder's Est., 29 Pa. C. C. 465 (1904), 7 Dauphin Co. 287, reported again in 30 Pa. C. C. 614, the petitioner failed to comply with the rule of court requiring security. Confer Chase v. Fisher, 239 Pa. 545 (1913), refusal to set aside receiver's sale, Grove's Est., 2 Woodward 182 (1867). In Acklin's Est., 237 Pa. 528 (1912), a party in interest petitioned to have the sale set aside two years after the purchase money had been paid and the deed delivered. Petition was refused.

(21) See cases cited n. 20 ante.

(22) In Scott's Est., 4 Phila. 178 (1860), 27 L. I. 4, the sale was set aside and the petitioner ordered to pay purchaser the expenses incurred.

setting aside the first sale upon the second purchaser entering into a binding agreement to purchase at the higher price with a direction to reimburse the first purchaser for the money outlay.[23]

Decree of Confirmation Conclusive as to Adequacy of Price.

§ 214. The decree confirming the sale is conclusive as to the price, consequently so long as the decree stands, nobody can be heard to say that the price is or ought to be other than the amount set out in the decree. Thus, where an administrator filed his account, having made a sale in partition, he cannot be surchanged because of the sale of the property at an undervaluation, the remedy in such a case being to apply to set aside the sale on the ground of inadequacy of price.[24]

Where, however, an executor or trustee sells under an express power, the rule is different.[25] If the party making the sale is

(23) In Brown's App., 68 Pa. 53 (1871), the court set aside a private sale for $5,250 under the Price Act before confirmation because an offer was made of $6,400, all parties except the first purchaser agreeing. The court set aside the first sale and authorized acceptance of the second offer on terms of reimbursing the first purchaser.

(24) Armstrong's App., 68 Pa. 409 (1871). In McPherran's Est., (No. 1) 212 Pa. 425 (1905), an administrator purchased at his own sale by leave of court, and it was held that on filing his account, he could not be surcharged with the profit obtained at a subsequent re-sale. In Schur's App., 17 W. N. C. 140 (1886), s. c. 1 Sadler 335, 2 Atl. 336, 1 Cent. 888, 4 East. 846, affirming Muller's Est., 16 Phila. 382, 41 L. I. 274, it was held that a party interested could not ratify sale, and at the same time claim it was void because of fraud. If a sale is confirmed, the decree fixing the price of the sale must be accepted. In Hazlett's Est., 137 Pa. 587 (1890), there was an administrator's sale for payment of debts. Exceptions were filed by a creditor, the estate being insolvent, which exceptions were dismissed. Brown, P. J., in the court below said, "The administratrix is asking the sale to be confirmed and if she has wrongfully refused a higher bid for the property by reason of which the exceptant's claim against the estate, if a valid one, is impaired, he has his remedy against her in the settlement of his accounts or possibly by an action." These remarks, however, unless understood as confined to a case of fraud, seem to be against the weight of authority and may be disregarded as unsound. In McRees' Est., 6 Phila. 75 (1865), 22 L. I. 389, a sale in partition was confirmed. The purchasers at the sale petitioned for an order on the trustee appointed to make the sale to make and execute a deed, which petition was granted, the fact that the property had advanced in value since the sale being immaterial.

(25) Dundas's App., 64 Pa. 325 (1870).

guilty of fraud, the rule appears to be otherwise and he may be surcharged on filing his account.[26]

Fraud.

§ **215.** The sale may be set aside or confirmation refused if it appears that any fraud has been practiced.[27]

Parties Who May Object to the Sale.

§ **216.** The validity of the sale may be challenged by other parties interested by exceptions to confirmation or petition to open sale.[28]

(26) In Sheridan's Est., 10 Kulp 157 (1900), an executor was surcharged with the difference between the price at which the sale had been made and the value of the property, it appearing that he knew that it was worth more and failed in his obvious duty to ask to have the return of the sale set aside, consequently was subject to the surcharge.

(27) Mitchell v. Kintzer, 5 Pa. 216 (1847); Corbett's Est., 10 D. R. 59 (1900); Myer's Est., 9 Pa. C. C. 439 (1891), defence of fraud by executor in buying at his own sale. Here the deed was delivered but no rights of third parties were effected. Armington's Est., 1 Phila. 444 (1852), 10 L. I. 115. It is, of course, clear that a secret agreement between lien creditors, by which they are not to bid at an Orphans' Court sale of real estate is void and cannot be enforced between the parties, Barton v. Benson, 126 Pa. 431 (1889). The rights of creditors cannot be affected by any agreement between the administrator and purchaser after the sale, Fish's Est., 16 Phila. 373 (1884), s. c. 41 L. I. 263. In Brittain's Est., 28 Pa. Super. C. 144 (1905), there was a sale by an executor under a power which was set aside by the Orphans' Court after execution and delivery of deed on grounds of fraud at the sale. The references to the Act of 1853 are a dictum entirely uncalled for by anything in the case. Tanner's Est., 218 Pa. 361 (1907), guardian's sale set aside on petition of the minor because guardian bought at his own sale.

(28) In the following cases, relief was afforded on the grounds indicated: Hannum's App., 2 Penny. 103 (1882), adminstrator's sale. Petition to open sale presented by lien creditor and granted on the ground that the administrator bought at his own sale, although no actual fraud. In Ike's Est., 200 Pa. 202 (1901), the sale had been made and exceptions to the confirmation of the sale dismissed, and the widow petitioned for an issue to try the validity of the note, which petition was refused. But party claiming under title adverse to the decedent cannot have the sale set aside on the ground that it would be a cloud on the title. He must fight out the question with the purchaser. Bodder's Est., No. 1, 13 D. R. 471 (1904), s. c. 30 Pa. C. C. 417. Heir or devisee, however, cannot object except on the grounds of (1) inadequacy of price, (2) that there was no jurisdiction to make the sale, confer Smith's Est., 188 Pa. 222

Preliminary Discussion as to Purchaser.

§ **217.** The purchaser is bound by his bid and may not trifle with the court by refusing to carry out the bargain, and the remedy by way of specific performance will be used against him if necessary. On the other hand, it is desirable to encourage bidders at such sales, and consequently the rule of caveat emptor will not be rigorously enforced so as to work an injustice. The purchaser, however, is not to be allowed to escape from his bargain because of trifling errors and defects of which he had notice. The court furthermore always will, if application be made at the proper time, relieve against a bona fide mistake.

Refusal of Purchaser to Carry Out the Terms of the Sale.

§ **218.** If the purchaser refuses to perform his part of the contract and carry out the terms of the sale, the court may grant an alias order of sale,[29] and if the sale has been confirmed, set the confirmation aside. The purchaser will then be liable for any

(1898). Carswell's Pet., 1 Phila. 521 (1854), s. c. 12 L. I. 14, petition by cestui que trust for order on trustee to make a mortgage. Trustees exceptions were dismissed. As to exceptions by remaindermen, see Gamble's Est., 9 D. R. 691 (1900); Loucks's Est., 203 Pa. 278 (1902); Smith's Est., 207 Pa. 604 (1904). In Drayton's Est., 6 Phila. 157 (1866), s. c. 23 L. I. 133, an examiner had reported in favor of granting the petition of a guardian of a minor for an order of sale under the Act of 1851. Petition was presented by the heirs ex parte materna of the minor to vacate the order on the ground that the sale would produce a conversion of the minor's interest, and therefore change the course of descent to the detriment of the petitioners. Petition dismissed on the ground that the sale was under the Act of 1851 and would not produce a conversion. The heirs of a decedent should always have an opportunity to show that the debts for the payment of which the sale is ordered are unjust or not well founded, consequently when they are not parties to the proceedings establishing the debt, they may have the proceedings for the sale set aside or suspended until they have an opportunity to contest the debt, Murphy's App., 8 W. & S. 165 (1844); Dean's App., 87 Pa. 24 (1878). As to standing of a judgment creditor of an heir to object, see Gheen's Est., 12 Phila. 123 (1878), s. c. 35 L. I. 234, confer Gheen's Est., 5 W. N. C. 319 (1878), perhaps the same case. In Derr's Est., 203 Pa. 96 (1902), where trustees had invested in real estate under the order of the Orphan's Court made under the Act of April 13, 1854, P. L. 368, a petition by the cestui que trust fifteen years later was dismissed.

(29) Jayne's Est., 2 W. N. C. 536 (1876).

loss at a resale unless the terms of the sale are varied so as to put the bidders in a less advantageous position.[30]

Purchaser Should Defend by Objecting to the Confirmation.

§ 219. Where there is any error in the proceedings or any irregularity affecting the title of the purchaser, the proper practice is for him to file exceptions to the confirmation,[31] or if the sale has been confirmed, to petition to have the confirmation set aside.[32]

(30) Banes v. Gordon, 9 Pa. 426 (1848), purchaser was not held liable because the terms of the first sale were one-half cash and the balance in one year, security by bond and mortgage, and the terms of the second sale were cash. Confer, Paul v. Shallcross, 2 Rawle 326 (1830). Kelly's Est., 17 D. R. 647 (1908), petition by person interested to have decree of confirmation of sale set aside, which was granted. The purchaser at the sale not making a deposit, the auctioneer re-sold the property instead of offering it to the next highest bidder, in consequence of which the property was sold at a smaller price. Rule otherwise in case of sheriff's sale; see Hotchkiss v. Homan, 25 Pa. C. C. 314 (1901).

(31) Purchaser must object before the confirmation, Confer Dull v. Slater, 31 Super. C. 488 (1906).

(32) In these cases the purchaser was afforded relief upon proper proceedings by the court opening the decree confirming the sale, or refusing to confirm return to order of sale. Hammill's Est., 234 Pa. 438 (1912), public sale in partition. Defence that the purchaser had been induced to bid upon the belief that the representations of the auctioneer would be ratified by the trustee and that they were not so ratified. Purchaser, however, had to pay cost because of his negligent conduct. McCaffrey v. Gibney, 223 Pa. 368 (1900), guardian's sale had failed to bar contingent remainders. Decree partially vacated and second sale to the same purchaser at the same price directed. Bodder's Est., 31 Pa. C. C. 46 (1904), s. c. 14 D. R. 53, petition to set aside sale. Misleading statements at the sale, the purchaser would only obtain a law suit. See Bodder's Est. (2), 30 Pa. C. C. 417 (1904), s. c. 13 D. R. 471 (1904). Veihdorfer's Est., 26 Pa. C. C. 317 (1900), petition by purchaser to set sale aside. Advertisement of the sale contained exaggerated misrepresentations as to the value of the property and as to material fact, thereby misleading the purchaser. Wiltberger's Est., 18 Phila. 232 (1887), s. c. 44 L. I. 431, 4 Pa. C. C. 184, misdescription and misrepresentation as to fact that a street had been widened. Petition of purchaser to rescind confirmation of sale; petition granted. DeHaven's App., 106 Pa. 612 (1884), misrepresentation by administrator made at the sale as to the title of the land sold. Petition granted. Sale set aside. Objections had been raised by other parties, and sale confirmed in such proceedings. Purchaser not thereby prevented from taking proceedings attacking the sale. Updike's Est., 18 D. R. 982 (1909), was a

Liablity of Purchaser After Confirmation.

§ **220.** Where the sale has been confirmed, the liability of the purchaser to pay the purchase money becomes fixed, and since he has a remedy by attacking the confirmation of the sale, the

case of a petition by a purchaser at an administrator's sale for the payment of debts, to revoke order for sale of decedent's real estate on the ground that the lien of debts had expired. Decree authorizing sale revoked. The court said a court of equity will grant relief before the delivery of the deed and the payment of the purchase money. Hostetter's Est., 222 Pa. 197 (1908), was a petition to open confirmation of administrator's sale. The administrator and purchaser had agreed in advance of the sale to submit the validity of the title to the determination of the court in a case stated. Held that the purchaser had no standing to contest the sale until he had taken steps to have a case stated submitted to the determination of the court and then the court should fix a time within which a case stated should be submitted. In Schwartz's Est., 12 Phila. 71, s. c. 35 L. I. 153 (1878), the sale was set aside as the property was subject to an encumbrance and the auctioneer did not announce the existence of the mortgage, and it was held that as the purchaser was misled, he was entitled to relief; as the administrator was at fault in not having the proper announcement made, he was directed to pay the costs. In Whiteman's Est., 13 Phila. 249 (1879), s. c. 36 L. I. 286, there was a petition by a trustee appointed in partition to compel payment of the purchase money or set aside the sale. The sale was set aside on purchaser paying the costs, it appearing that the sale had been advertised free of encumbrances, and there was a private right of way across the property, the existence of which was unknown. In Pennock's App., 14 Pa. 446 (1850), exceptions by purchaser to confirmation of administrator's sale for payment of debts were sustained on the ground that the administrator employed puffers at the sale, by reason of which the purchaser paid a sum in excess of the real value. The exceptions were dismissed in the court below, which was reversed on appeal, overruling the case of Steel v. Ellmaker, 11 S. & R. 86 (1824), which was a case of a sale of goods at auction, where it was decided that the seller might fairly employ an agent to bid the property up at the sale to a limited price without making it publicly known. Horn's Est., 10 York 156 (1896), accord. In Schug's App., 14 W. N. C. 49 (1883), s. c. 41 L. I. 45. there was an administrator's sale for payment of debts which was returned and confirmed. A rule by the purchaser to show cause why confirmation of sale should not be struck off was taken on the ground of (1) puffing at the sale, (2) mistake of 25% in the number of acres sold. The court below discharged the rule, which was reversed on appeal, and the sale set aside, and the administrator ordered to refund to the purchaser the money paid on account, the fact that the puffing was not authorized by the administrator being immaterial. In Dively's Est., 1 Lanc. L. R. 359 (1884), there was a trustee's return to order of sale, and exceptions

general rule is that he cannot set up any defence to the payment of the purchase money, to which rule there are certain exceptions which will be noted.

Proceedings may be taken in the Orphans' Court against the purchaser for specific performance under the general equity

were filed by the purchaser on the ground of false and fictitious bidding at the sale, which were sustained and sale set aside at the cost of the estate. New order of sale to issue. In Penn Square Bldg. Assn.'s App., 81½ Pa. 330 (1876), there is a dictum that where a purchaser at a sale purchased for full value in ignorance of the law or fact that a certain mortgage was not discharged by the sale, the court before confirmation has power to and probably will grant him relief. For a case where such relief was granted, see Johnson's Est., 15 Phila. 543 (1882), s. c. 39 L. I. 160. In Moulton's Est., 15 Phila. 579 (1882), s. c. 39 L. I. 412, decree confirming sale vacated on petition, probably of the purchaser, that the handbills misstated the amount due on an encumbrance subject to which the property was sold.

In King's Est., 2 Leh. Val. L. R. 229 (1886), exceptions to return of sale by a purchaser were sustained, it appearing that there was a cloud on the title, and that the purchaser had been led to believe that the title was unquestioned. In Bopp's Est., 18 York 161 (1905), the purchaser's petition to have the sale set aside was granted, it appearing that the petition had been presented under the Act of June 12, 1893, P. L. 461, and was irregular because it was not the joint petition of the widow and heirs. In Lerch's Est., 2 Leh. Val. L. R. 348 (1886), exceptions by the purchaser were sustained, it appearing that the interest sold was an undivided one instead of an entire interest in the property.

In these cases the purchaser was denied relief: Murtland's Est., 16 Phila. 222 (1883), s. c. 40 L. I. 120, petition by purchaser to vacate sale was refused, the misdescription alleged being insufficient to justify setting aside the sale. In Boyle's Est., 2 Kulp 169 (1882), exceptions to the report of the examiner in the matter of enforcing sale of real estate were dismissed, five years having elapsed from the time of the sale and the purchaser having, in the meantime, been in possession; it was held that he could not set up a misunderstanding of his rights. In Gillespie's Est., 10 Watts 300 (1840) there was an administrator's sale and decree made confirming sale and appeal therefrom. A would-be purchaser who had not obtained the property objected on the ground of irregularity and that administrator had adjourned the sale. It was held that the administrator could so adjourn for not more than twenty days; that the petitioner was guilty of laches, and all the other parties thought the sale was fair and to their interest and advantage. It does not seem that a stranger who is anxious to obtain the property has much standing to object to the sale which has been made. See Hamilton's Est., 51 Pa. 58 (1865). In Miller's Est., 8 York 7 (1893), exceptions by purchaser to return of sale were sustained.

power of the court or the parties may submit a case stated in the Common Pleas for the determination of the court,[33] or an action of assumpsit may be brought in the Common Pleas for the purchase money or the balance due.[34]

(33) For instance of case stated, see Reed v. Palmer, 53 Pa. 379 (1866).

(34) In the following cases the sale had been confirmed by the court, and in an action for the purchase money, it was held that the purchaser could not interpose the defence specified, his liability to pay becoming absolute on the confirmation of the sale. In most of these cases it appeared that the deed had been delivered and accepted. In none of them, at least was there any indication to the contrary: Fahrig v. Schimpff, 199 Pa. 423 (1901), administrator's sale, defence of vendee that he bought for the administratrix personally, and was only to be accountable to her for what he realized on a re-sale. Miles v. Diven, 6 Watts 148 (1837), administrator's sale, defence of misrepresentation by administrator and mistake in quantity of land sold. Vandever v. Baker, 13 Pa. 121 (1850), administrator's sale, defence of misrepresentation by declaration of the crier as to encumbrances. Crier had no authority to make a contract or vary the terms of the sale. Dawson and Springer v. Ewing, 16 S. & R. 371 (1827), administrator's sale, defect in title of the decedent of which they had no notice, and failure of administrator to give bond. Bashore v. Whisler, 3 Watts 490 (1835), administrator's sale, defence of title outstanding in third person of which notice had been given at the sale. King v. Gunnison, 4 Pa. 171 (1846), administrator's sale. Defence that title was in a third party. Sackett v. Twining, 18 Pa. 199 (1852), administrator's sale in proceedings in partition. Defence of deficiency in quantity of acres. Purchaser failed to have a re-survey before confirmation, which right was reserved to him by the terms of the sale. In Donnelly v. Byers, 234 Pa. 339 (1912), executor's and trustees' private sale under power ratified by Orphans' Court as a sale for the payment of debts. Defence of purchaser that land was subject to claim of creditors of the decedent, all of whom were barred from claiming against the real estate. Language of Mestrezat, J., too broad. In Richter v. Fitzsimmons, 4 Watts 251 (1835), there was an action for purchase money by the administrator. Sale confirmed and deed offered to purchaser who refused to pay the purchase money. The purchaser had objected to confirmation of the sale, and the court had overruled the objections. He now apparently presented the same objections and also some others. It was held that the decree was final, under the statute. In Fox v. Mensch, 3 W. & S. 444 (1842), sale by administrator. Defence that there was only a reversionary interest sold instead of an interest in fee. In Robb v. Mann, 11 Pa. 300 (1849), there was an administrator's sale for payment of debts and an action on the case for the balance of first instalment of purchase money, the sale having been confirmed and deed tendered to purchaser who refused it and had gone into possession; the defence was raised that the machinery and apparatus of a stone distillery situate on the premises and sold with

Where, however, the court is without jurisdiction and no title will pass under the decree, the purchaser will not be compelled to pay the purchase money and may set up the defence in an action therefor,[35] or in a proceeding for specific performance.

it had been removed between the time of the sale and the confirmation thereof, which defence was overruled. The court said that the loss should fall on the purchaser who had an inceptive title to the land and a remedy against the person who took away the property.

In Gilmore v. Rodgers, 41 Pa. 120 (1861), s. c. 9 Pitts. L. J. 209, sub nom. Gilmore v. Rogers, 19 L. I. 28, a guardian sold under order of court, the undivided interest of the minor, and in a suit against the purchaser on the purchase money obligation, the defendant set up in defence the following defects in the proceedings: (1) mistake as to the amount of the interest of the minors, it appearing that they had five-sevenths when they were supposed to have had, and settlement made on the basis of their owning, one-half; (2) mistake in the acreage; (3) circumstance that the owners of the other undivided interests did not join in the petition; (4) that the private sale of an undivided interest was not authorized by the act; (5) that the record was irregular in that there was no return to the order of sale until after two entire terms of court had intervened, and the report of the guardian was not signed or sworn to. Judgment for plaintiff. In McCaffrey v. Gibney, 223 Pa. 368 (1909), an action of assumpsit was brought to recover balance of purchase money. judgment was entered for the plaintiff. The defence that the sale failed to bar contingent remainders, and that it was void because a ratification of a previous private sale, was overruled.

(35) O'Brien v. Wiggins, 14 Super. Ct. 37 (1900), was an action of assumpsit to recover purchase money by administrator who had had a private sale for the payment of debts confirmed by the court. Defence was that the sale did not divest the lien of certain judgments entered against the intestate in his lifetime. Judgment for the defendant as the court held the judgments were not discharged. The Act of 1853 did not apply because by the Act of March 23, 1867, P. L. 43, the lien of debts of record are saved from discharge by private sales. The Act of May 9, 1889, P. L. 182, only authorizes a private sale where under existing laws the court had power to decree a sale, and therefore the validity of the sale must be decided by the provisions of the prior act. That the petition was under the Act of March 29, 1832, P. L. 190, a public sale under which discharged the lien of judgments, and therefore a decree under the Act of 1889 upon a private sale would have the same effect, but that the case was not properly conducted under the Act of 1832, because it did not have the averment that the personal estate of the decedent was insufficient for the payment of his debts nor an inventory of the personal estate, a correct statement of the real estate, or an account of the debts of the decedent. The court based its decision expressly on

Liability of Purchaser After Deed Delivered and Purchase Money Paid.

§ **221.** Where the deed has been delivered and purchase money paid, the purchaser must remain content with the title he has acquired as he has had an opportunity to present any defence in court. The court even here, however, will interfere upon grounds of mistake and fraud although being very careful to respect any intervening rights of third parties.[36]

the ground that the facts set forth in the petition were insufficient to confer jurisdiction on the Orphans' Court to decree a sale.

In Westhafer v. Koons, 144 Pa. 26 (1891), there was a case stated to determine the validity of the title derived under Orphans' Court proceedings, and it was held that the purchaser could refuse to take the title because there was a failure to set out in the petition the circumstance that the proceedings were to bar contingent remainders, and therefore the remainders were not barred.

In Keller v. Lees, 176 Pa. 47 (1896), there was an action of assumpsit for the purchase money, and the defendant was allowed to set up, to relieve himself from payment, that the sale failed to bar remainders to a class, as there was no jurisdiction under the act to make a decree in such a case.

In these cases, a bill in equity was filed for specific performance and the purchaser was allowed to set up the defence specified. Howe's Est., 14 Pa. C. C. 574 (1894), s. c. 3 D. R. 267, purchaser permitted to resist petition for specific performance because the auctioneer stated that the ground rent on the property was redeemable when it was irredeemable. In Taylor's Est., 17 D. R. 692 (1908), the court refused to make a decree since the title of the purchaser would be unmarketable owing to irredeemable ground rents. Confer, dictum in Bickley's Admr. v. Biddle, 33 Pa. 276 (1859). In Miller v. Spear, 21 W. N. C. 554 (1888), there was an administrator's sale for payment of debts, and on a bill in equity in the Common Pleas for specific performance a decree was entered for the purchaser because the sale was private, and the statute only authorized a public sale, and therefore no title would be conferred. The purchaser was denied relief in Brock v. Steel Co., 203 Pa. 249 (1902), where in a bill in equity for specific performance in the Common Pleas, decree was entered for the plaintiff. The purchaser set up a defence as to irregularities in the form of the petition.

(36) Where a guardian has sold under order of the Orphans' Court a tract of land for 200 acres which in fact contained only 32 acres, the purchaser on application to the court two years after the date of the deed could have the sale set aside, deed back the land and obtain a restitution of the purchase money, Johnson's App., 114 Pa. 132 (1886).

In Nimick's Est., 179 Pa. 591 (1897), the court upon petition seven years after the deed was delivered, corrected the deed by setting aside the conveyance and directing the conveyance to be made in proper form.

The Title Passed by the Sale.

§ 222. The Orphans' Court can only authorize the sale, etc., of the title derived under the deed or will or acquired by purchase in the manner prescribed in the act, and all other interests remain unaffected unless they are such interests as cannot be asserted against a purchaser for value without notice, and the purchaser at the sale can bring himself withing that definition.[37]

The deed was made by mistake to certain individuals as surviving partners as tenants in common, when it should have been made to them as surviving partners. Where there was a mistake in the case of a sale by a guardian of the interest of a minor, which mistake was participated in by the purchaser, the court held, the deed having been delivered, that the mistake could not be corrected; and as the time for the correction of the error had long since elapsed, the vendor could not set up the defence in an action on a bond for the purchase money, Gilmore v. Rodgers, 41 Pa. 120 (1861). Tubb's Est., 4 D. R. 325 (1894), sale for payment of debts. Discovery of old deed showing that the decedent had a one-eighth instead of the whole. Rule by purchaser to set aside after delivery of deed but before payment of purchase money, was granted. Administrator consented to rule which was opposed by one creditor. Confer also Duncan's Est., 1 W. N. C. 14 (1874).

In these cases the rights of third parties had intervened: Landreth v. Howell, 24 Super. C. 210 (1904), in this case there was a mistake of 10 per cent. in acreage in a master's deed in partition, and the money had been distributed. It was held that the purchaser, who brought assumpsit against one of the parties who had received the fund, could not have relief. In Wylie's Est., 7 D. R. 748 (1898), an administrator's sale for the payment of debts was confirmed, and a deed delivered to purchaser. The sale was set aside on petition of a judgment creditor because the court had been misled as to the encumbrances on the property. The decree expressly protected the rights of the purchaser.

(37) In McCormick's App., 57 Pa. 54 (1868) there was a sale of the legal title of a partner for the payment of his debts, and it was held that the sale passed only his interest as partner in the land. Dictum case arose on distribution of the proceeds.

Kline's App., 39 Pa. 463 (1861), administrator's sale for payment of debts was duly confirmed. Before deed delivered, widow petitioned to vacate sale, claiming a resulting trust in the land in her favor. Petition refused as proof of trust was insufficient. The purchaser was willing to have sale confirmed and as only title of decedent was sold, the widow had a right to maintain an ejectment.

In Bodder's Est., No. 1, 30 Pa. C. C. 417 (1904), the property of a decedent was sold for the payment of debts, and a claimant under a deed from the decedent in his lifetime petitioned for an order to set aside the sale, which was refused, the court saying that his remedy was by ejectment, and that the purchaser at the sale only bought the title of the decedent.

Any title which could be successfully asserted against the title sold will be unaffected by the sale, and any title which was unavailing against the title sold will be equally unavailing against the purchaser.

It seems also that the deed passes all the land intended to be sold, and the omission of part of the property in the description is immaterial where the case arises in a collateral action forty years after the sale.[38] So also where the title sold is subject to a right of way, the purchaser takes subject to the easement,[39] and a claim by adverse possession against the title sold may be set up against the purchaser at the sale.[40]

George v. Trust Co.[41] was an ejectment by a daughter against the estate of her mother to recover an interest in land, of which the plaintiff's father had died intestate, and which had been sold by his administrator, under order of Orphans' Court, to his widow, the defendant. The daughter claimed that her interest as heir of her father was not divested by the sale. Judgment was entered for the defendant as the plaintiff was estopped.

Purchaser Obtaining Possession.

§ **223.** It was provided by the Act of April 9, 1849,[42] that the purchaser of real estate sold under order of the Orphans' Court should have the right to recover possession after confirmation of the sale and execution and acknowledgment of the deed in the same manner as was provided in relation to purchasers at sheriff's sale.[43]

(38) McGhee v. Hoyt, 106 Pa. 516 (1884), s. c. 41 L. I. 399.

(39) In Overdeer v. Updegraff, 69 Pa. 110 (1871), there was an administrator's sale for payment of debts of property which was subject to an apparent continuous and necessary easement imposed by the decedent in his lifetime for the benefit of other properties. The alley was not mentioned in any of the court proceedings but was reserved in the conditions of sale and in the deed. It was held that the purchaser took subject, the case arising in an action by the servient tenement against the dominant tenement for trespassing on the easement, Tomlison v. Trenton, N. H. & L. St. Ry. Co., 31 Pa. C. C. 81 (1905).

(40) Harrington v. Stivanson, 210 Pa. 10 (1904).

(41) 234 Pa. 300 (1912).

(42) P. L. 524, Sec. 16.

(43) For cases of a proceeding under this act, see Merritt v. Whitlock, 200 Pa. 50 (1901), where it was held that the Act of May 24, 1878, P. L. 134, providing that one justice of the peace could act where two were

The Act of April 20, 1905,[44] purports to provide a remedy by which purchasers at judicial sales may obtain possession and expressly repeals the latter part of Sec. 16 of the Act of April 9, 1849.[45]

The act of 1905 is of doubtful constitutionality since the title does not appear to give notice of all its contents, and there is therefore some doubt as to the remedy which a purchaser at Orphans' Court sale now has for obtaining possession. Of course, if the proceedings are under the Act of 1905, and the defendant raises no question as to the constitutionality, the purchaser may obtain his remedy under that act, and if it should be subsequently declared unconstitutional in another proceeding, it would not affect him as he would be in possession of that which was his own. If, however, the defendant should raise the question of constitutionality and the act be declared unconstitutional, then the purchaser would have to begin over again under the Act of April 9, 1849.[46]

Rights of the Various Parties Pending Completion of the Sale.

§ **224.** Since the actual sale, the confirmation thereof by the court, and the payment of the purchase money and delivery of the deed are not simultaneous acts but are separated by some little intervals of time, questions frequently arise as to the rights of the parties in the meantime. The case differs from that of an ordinary vendor and vendee in that the sale is made by the court which may withdraw at any time, even after the consummation of the sale. The general law therefore governing the relation of vendor and vendee will be subject to some variation.

We must therefore consider (1) The title of the heir or devisee, (2) The incident of rights and liabilities between the heir or devisee and the purchaser, (3) The title of the purchaser as to which latter it will be necessary to distinguish (a) the lien of

before required, did not effect the Act of 1849, supra, and the proceedings were therefore void because held before only one justice. Potts v. Wright, 82 Pa. 498 (1877), s. c. 34 L. I. 148, 24 Pitts. L. J. 125, 5 Law Times O. S. 35, 9 Lanc. Bar 14.

(44) P. L. 239. See Act of April 8, 1905, P. L. 121.

(45) P. L. 524.

(46) P. L. 524, Sec. 16. In the case of Young v. McCamant, 241 Pa. 232 (1913), proceedings were sustained under the Act of April 20, 1905. P. L. 239, without any question being raised as to its constitutionality.

judgments, (b) rights against third parties, (c) devolution of the title.

Title of the Heir or Devisee.

§ **225.** The title of the heir or devisee is not divested until the confirmation of the sale and the execution and delivery of the deed. The purchaser, therefore, is not entitled to possession until such consummation of the sale, and the heir or devisee may assert his title in ejectment even though the purchase money has been paid and the sale confirmed.[47] If the heir or devisee dies before the delivery of the deed, even after confirmation, he dies seized of real property and his interest devolves as such.[48] Although the heir or devisee is entitled to possession and judgment will be entered for him, the court will, to avoid circuity of action, direct the judgment to be vacated if the defendant shall settle with the executor or person making the sale and receive the deed within a reasonable time.[49] There is therefore no alienation until confirmation, consequently insurance policies are not avoided, and an administrator may sue on the policy to the use of the vendee for loss occurring between the sale and the confirmation.[50]

The Incidence of Rights and Liabilities Between the Parties.

§ **226.** The general rule in equity is that the vendee is the owner of the property sold from the time of making the agreement of sale, and the vendor is merely entitled to the purchase money and the burdens and benefits of ownership are adjusted between them accordingly. The only circumstance which varies

(47) Leshey v. Gardner, 3 W. & S. 314 (1842); Greenough v. Small, 137 Pa. 132 (1890).

(48) Erb v. Erb, 9 W. & S. 147 (1845); Biggert's Est., 20 Pa. 17 (1852). A fortiori where the heir dies before the sale is made, Ferree v. Comm., 8 S. & R. 312 (1822).

(49) Stevenson v. Scott, 188 Pa. 234 (1898). See Smith's Est., 188 Pa. 222 (1898).

(50) Farmers Mutual Ins. Co. v. Graybill, 74 Pa. 17 (1873). The purchaser is not entitled to the rents accruing after final confirmation and before execution of the deed, Strange v. Austin, 134 Pa. 96 (1890), aff. 7 Pa. C. C. 128 (1889). In this case the tenant had paid the rent to the purchaser and it was held that this did not discharge his debt to the heir. Purchaser is not entitled to recover the rents from the accountant, Law's Est., 7 Pa. C. C. 605 (1890).

the case of an Orphans' Court sale is the fact that the court which makes the sale has power to withdraw when an individual would be bound to proceed. But few cases have arisen on this point, and the law is probably the same in each case.

In Kayser's Est.,[51] certain trustees made a sale subject to the approval of the Orphans' Court, and the question was as to the liability of the purchaser to pay a municipal lien. The agreement called for a good and marketable title, clear of all encumbrances, and both parties were ignorant at the time of the contemplated improvement. The contract for building the sewer was made by the city on May 11; the agreement of sale was made May 21; the work begun May 27; order of sale made June 15; work completed June 14; deed executed and entered June 23. The court held that the equitable title of the purchaser vested in him May 21. The lien was from the time of the doing of the work, which was on June 14, subsequent to the date of the agreement of sale, but before the execution and delivery of the deed. The title was free of encumbrance at the time of making the agreement, and the burden, therefore, was to be borne by the purchaser, and the money to pay the claim, which had been retained, was held to be payable to the vendor.

Destruction of Buildings by Fire.

§ 227. It is not quite clear as to who is to bear the loss if the improvements on the premises sold are destroyed by fire pending the completion of the sale. It was decided in Demmy's App.,[52] that it was inequitable in the case at bar for the purchaser to bear the loss caused by fire, although not necessary to decide that point, and that the remarks of Rogers, J., in Robb v. Mann,[53] that the loss would be borne by the purchaser, should be disregarded.

(51) 9 D. R. 360 (1900).

(52) 43 Pa. 155 (1862). The sale was made Sept. 24, 1859, but owing to objections of the widow and heirs, confirmation was delayed until after the fire which was on March 3, 1860. It was held that the purchaser could refuse to take the property.

(53) 11 Pa. 300 (1849) at 305. A third party took away certain property on the land, the sale having been made January 31, 1846, the purchaser took possession April 1, 1846, the sale was confirmed May 12, 1846, and the property taken away before April 1, 1846. It was held the purchaser had a remedy against the third party.

The occurrence of the fire is no ground for setting aside the sale.[54]

There is a dictum of Bittenger, P. J.,[55] that the purchaser must stand the loss of buildings destroyed after the confirmation of the sale.

The general rule in case of an agreement of sale is that the vendee is the owner in equity the moment the agreement of sale is signed, and therefore if the buildings are destroyed by fire pending the consummantion of the transaction, the loss is his and he is entitled to the proceeds of insurance policies, if any.[56] While the decisions we have referred to are not altogether clear, it seems probable that the same rule will apply in the case of Orphans' Court sales.

Apportionment of Interest on Encumbrances.

§ 228. It seems clear that at the settlement if any encumbrances on the property remain, that the interest thereon should be apportioned as of the date of settlement. While there is some doubt on this point as to the case of a ground rent because a ground rent is not ordinarily apportionable, it does not seem that the doubt should prevail because the considerations as to the apportionability of the ground rent do not apply to the transaction between a vendor and vendee.[57]

(54) Farabee's Est., 29 Pa. C. C. 334 (1904). In this case there was a rule by the purchaser to lift an absolute confirmation of sale. A fire had occurred in the premises before absolute confirmation. The petition was dismissed as the court said that the purchaser could protect himself by retaining part of the purchase price, and if there was any desire to test the question, suit could be brought in the Common Pleas for the balance of the purchase money and the question decided there.

(55) In Bopp's Est., 18 York 161 (1905).

(56) Reed v. Lukens, 44 Pa. 200 (1863).

(57) In Law's Est., 6 Pa. C. C. 647 (1889), there was a petition by a purchaser to revoke an order of sale on the ground that the testamentary trustee who had made the sale insisted on the purchaser paying the accruing interest on a certain mortgage. The petition was dismissed, the trustee being directed to make an allowance at the settlement with the purchaser of the arrears of interest on the mortgage, otherwise the decree of confirmation would be vacated. See remarks of Penrose, J., in Terry's Est., 13 Phila. 298 (1879), s. c. 36 L. I. 461. This case arose on the audit of account by administrator who had sold under order of court for the payment of debts. It does not appear under what act. The property had been sold subject to a ground rent and a mortgage. It was held that the purchaser took

Title of the Purchaser.

Preliminary.

§ 229. The purchaser takes an equitable title to the land. Questions arise as to (1) the lien of judgments, (2) his rights against third parties, (3) the devolution of the title where he dies pending the completion of the sale.

Judgment Against Purchaser.

§ 230. Judgments will frequently be entered against the purchaser pending the consummation of the sale, and the question will arise whether they are a lien upon his interest before he takes title. The cases are as follows:

In Holmes' App.,[58] there was a sale under order of court for payment of debts. The purchaser paid the purchase money. Exceptions to the confirmation were filed by various parties in interest pending which certain judgments were entered against the purchaser. Subsequently the exceptions were dismissed and deed was made to the purchaser. At a subsequent sale in partition of the purchaser's title after his death it was held that these judgments were first liens on the title, the same as in the case of a private agreement for sale of land.

In Jacobs' App.,[59] there was an administrator's sale in partition under order of the Orphans' Court. One-half of the purchase money was to be paid April 1, 1849, and the rest to be secured and deed to be made when the other one-half was to be paid. The sale was confirmed Nov. 20, 1848, the one-half due April 1, 1849, was not paid, the purchaser made final settlement May 19, 1849, and deed was delivered to him on that day, and he gave a judgment bond for the balance of the purchase money. A judgment was entered against the purchaser on April 4, 1849. The property was subsequently sold under execution on the purchase money judgment, and it was held that it should be first paid out of the proceeds of the sale. The court said that the sale was a public sale for cash, and the extension of the time of payment was

subject to the two encumbrances, (the syllabus refers to the Act of March 23, 1867; no reference thereto by court,) therefore, accountants should not have credit for arrearages of ground rent and interest on mortgage which had been allowed in the settlement.

(58) 108 Pa. 23 (1884).

(59) 23 Pa. 477 (1854).

contrary to the order of the court and void, and therefore the purchaser could not at that time enforce the terms of that sale, consequently he had no title. It is to be observed that the sale had been confirmed by the court before the judgment by the purchaser was entered, and therefore the terms of the sale were valid because ratified by the court.

In Thompson v. Rogers,[60] a purchaser at an administrator's sale which had been confirmed, and who was in default in his payments, made a parol sale of the land to A., who paid the administrator the rest of the money. In the mean time, a judgment had been entered against the purchaser and his interest was sold under execution on the judgment to B. The administrator then made a deed to the purchaser and A., as tenants in common. A. brought ejectment against B. It was held that A. had no title on which he could recover either under the parol agreement with the purchaser or under the deed from the administrator, as that deed was not made to the party to whom the sale was confirmed. The judgment was recovered before the payment of any purchase money by A. In this case, of course, A. had no title at all, and the decision does not really touch the effect of the judgment, which could only be raised in a controversy between B. and the purchaser at the sale. It seems that under these cases the judgment binds whatever title the purchaser has, and if, therefore, he is in default he has no title, and the judgment does not bind, whereas, if he has fulfilled the terms of the agreement, he has an equitable title which ripens into a legal title when the deed is delivered and the lien of the judgment dates back to the date of agreement of sale.

Rights of Purchaser Against Third Parties.

§ **231.** After deed delivered, the purchaser becomes the owner, as in every sale, and entitled to all rights as such, and before the delivery of the deed, he is a vendee and may assert his rights in certain cases against third parties.[61]

(60) 67 Pa. 39 (1870).

(61) Thus, in Tomlinson v. Trenton and New Hope, etc., R. R. Co., 31 Pa. C. C. 81 (1905), it was held that the purchaser could maintain a bill in equity against a railroad company to restrain unlawful entry on the land after the confirmation but before the delivery of the deed. In Robb v. Mann, 11 Pa. 300 (1849), there was an action by administrator against purchaser for instalment of purchase price, and there was a dictum that

Devolution of Purchaser's Title.

§ **232.** The title of the purchaser, for the purpose of devolution under the intestate laws, dates back to the time of the confirmation of the sale. In Frick Coke Co. v. Laughead,[62] there was an administrator's sale for payment of debts in 1812. The purchaser went into possession, paid part of the purchase money, and died intestate. The balance of the purchase money was paid by his administrators who took the deed to themselves as administrators for the use of the heirs of the decedent. It was held in ejectment between those claiming under the heirs of the purchaser that the title was in him, and that he was the perquisitor for the purpose of tracing descent, the title relating back to the confirmation by the court.

Alienation of Purchaser's Title.

§ **233.** It seems perfectly clear that the purchaser may freely dispose of his title with the consent of the court. The reason the consent of the court is necessary is because the sale can only be consummated by delivery of the deed to the purchaser and the delivery of the deed to another party will confer no title.[62a]

Who is to Execute Deed.

§ **234.** The deed is executed under the order of the court and by the hand of the court acting merely through the instrumentality of the person appointed to make the sale. Therefore, any personal disqualification of the person making the sale is immaterial, as, for instance, the circumstance that a guardian is a lunatic.[63] The deed is to be executed by the person directed to make the sale.[64] A number of statutes have been past providing for the case of the death, insanity, removal, etc., of the person directed

the purchaser could maintain action on the case and not trespass against third parties who took away a building between the making of the sale and delivery of the deed.

(62) 203 Pa. 168 (1902).

(62a) See § 237, post.

(63) Grier's App., 101 Pa. 412 (1882), s. c. 40 L. I. 90, 30 Pitts. L. J. 224, Dict.

(64) In Backenstoss v. Stahler's Admrs., 33 Pa. 251 (1859), where there was an administrator's sale under proceedings in partition, the purchaser took a deed from the widow and heirs, and it was held that it would have the same effect as if made by the administrator.

to execute the deed. Since the insanity of the person executing the deed is immaterial there seems to be no occasion for the statute unless the incapacity is sufficient to interefere with the actual execution of the deed. So also where there are several trustees directed to make the sale, the survivors may execute, and where the person acting buys at his own sale, the decree will be executed by the clerk of the court.[65]

(65) Section 1. Be it enacted, etc., That in all cases where a sale of the real estate of a decedent shall be made by executors or administrators, or guardians, under an order of the Orphans Court, if one or more of such executors or administrators, or guardians, shall die or be discharged before a conveyance is made to the purchaser, it shall and may be lawful for the surviving executor or executors, administrator or administrators, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of the sale.

Section 2. That in all cases where a sale of the real estate of a decedent hath heretofore been made by executors or administrators, or guardians, under an order of the Orphans' Court, and one or more of such executors or administrators, or guardians, hath or have died before a conveyance hath been made to the purchaser, it shall and may be lawful for the surviving executor or executors, administrator or administrators, or guardians, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale; that where authority is or shall be given by decree of court to trustees, or other persons, to sell real estate, and any such trustees or other persons authorized, shall have died, resigned or ceased to act, before a sale is effected or a deed executed, in all such cases sales may be effected and a deed executed by the surviving or succeeding trustee or trustees, or other persons, with as full effect, in all particulars, as if effected or executed by the persons acting in the trust, or other office, at the time a sale was originally decreed. Every deed made in pursuance of and agreeably to the provisions of this act, shall vest the property, therein described, in the grantee, as fully and effectually as if the same had been made by all the persons who may have sold any such estate circumstanced as aforesaid. Act of May 1, 1861, P. L. 431.

Section 1. Be it enacted, etc., That whenever any Orphans' Court or Court of Common Pleas, having authority under existing laws to decree a sale of real estate, shall issue an order to any executor, administrator, guardian or trustee, either specially appointed for the purpose or otherwise, to sell such real estate, and shall confirm such sale, and such administrator, executor, guardian or trustee shall die before the execution of a deed to such purchaser, the proper court shall have power, on the petition of the purchaser, to direct the clerk of such court to execute and deliver to the purchaser the necessary deed of conveyance for such real estate,

Endorsing Decree on Deed.

§ 235. It was formerly the practice among many conveyancers to have a certified copy of the decree endorsed on the

on his full compliance with the terms and conditions of sale, paying into court the moneys payable and delivering to the clerk the securities required by the said terms and conditions, which moneys and securities shall remain subject to the disposition of the court, and said deed shall be valid and available to such purchaser, as fully as if it had been executed and delivered by the proper administrator, executor, guardian or trustee under existing laws.

Section 2. That whenever any Orphans' Court or Court of Common Pleas, having jurisdiction to decree a sale of real estate, shall issue its order to any administrator, guardian, executor or trustee, specially appointed for the purpose, or otherwise, to sell such real estate, and shall in any case within its jurisdiction give authority to any administrator, executor, guardian or trustee to bid at such sale, and said court shall confirm the sale of said real estate to such administrator, executor, guardian or trustee, the said court may make an order directing its clerk to execute a deed for said real estate to such purchaser, who shall account for the amount of such purchase money, in the settlement of his accounts with the register of wills, to said Orphans' Court or Court of Common Pleas, as the case may be.

Section 3. That whenever any Orphans' Court or Court of Common Pleas, shall have heretofore made an order for its clerk to execute a deed in any of the cases mentioned and provided for in the first and second sections of this act, and such deed shall have been accordingly executed and delivered, such deed shall be valid and available to the purchaser to vest in him the right, title and interest of the person as whose land the said real estate had been sold. Act of May 22, 1878, P. L. 83.

Where real estate is ordered sold in proceedings in partition and (1) there shall be no executor or administrator to execute the order, (2) executor or administrator shall neglect or refuse to execute, the court may appoint some suitable trustee to make the sale who shall proceed as executor or administrator would: Act of February 24, 1834, P. L. 70, Sec. 44.

The Act of April 19, 1901, P. L. 83, provides: Section 1. Be it enacted, etc., That in any proceedings at law or in equity, in any of the courts of this Commonwealth having jurisdiction, if the said court shall order a conveyance to be executed by either of the parties to the said proceeding or his or her interest in any lands or tenements to any other party or person, and the party so ordered shall neglect or refuse to comply with the said order and make the said conveyance, or shall die, flee the jurisdiction, or become insane without having complied therewith, it shall be lawful for the said court to order and direct that such conveyance be made by the sheriff, prothonotary or clerk, or by a trustee specially appointed for that purpose; and the said conveyance having been duly executed by the said sheriff, prothonotary, clerk or trustee, and acknowledged in open

deed.[66] The advantage of this was that if the Orphans' Court record should be destroyed or lost, the decree itself or the record thereof would bear evidence of the action of the court. This practice has fallen into disuse, and the deed under the decree now generally merely recites the proceedings in the Orphans' Court, and it is very seldom that a certified copy of the decree is asked for. There is no harm in having it done, but there does not seem to be any particular advantage in going to the extra expense and trouble.

Acknowledgment and Recording of Deed.

§ **236.** The Price Act requires the deed or mortgage to be acknowledged in court.[67] There seems to be no reason why the deed or mortgage should be acknowledged before the court or why the general law as to acknowledgment of deeds and mortgages should not apply. It has been accordingly provided by the amendment of April 22, 1903,[68] that the deeds, mortgages or leases made in pursuance of the provisions of the act may be acknowledged by a justice of the peace, notary public or other officer having authority under the laws of the state to take acknowledgments or deeds and other instruments of writing therein. The only obscurity here is as to the meaning of the word

court, shall be good and effective to convey the interest of the recusant, neglecting, deceased, persons fleeing the jurisdiction, or insane party, to the extent ordered by the court, the same as if it had been duly executed and delivered by such party personally: Provided, That this shall not prevent the said court from punishing the contempt of the said party by fine and imprisonment, if deemed necessary: Provided further, That no such order shall be made, in case of the decease of such party, until notice shall have been given to his or her heirs and legal representatives, by process duly served, if resident within the Commonwealth, or, if not, by publication and copy mailed to the last known address of the same, according as the court shall order and direct.

Section 2. This act shall apply to any proceeding in which the court shall have heretofore ordered such conveyance to be executed, as well as to any in which it shall hereafter be ordered.

(66) See Jermon v. Lyon, 81 Pa. 107 (1876), see bottom of p. 108.

(67) The provisions of the act are as follows: Sec. 4. Such sales, etc., shall be under the direction and subject to the approval of the court before which the deed shall be acknowledged, and be certified under seal to have been acknowledged.

(68) P. L. 241, see Appendix A., n. 64. This act amends and extends certain previous amendments which are cited in the appendix.

"therein." Does it apply to the lands and tenements or does it apply to officers taking the acknowledgments within the state. If the latter, then it is clear that no deed or mortgage executed under the provisions of the act may be acknowledged outside of the state. If the word "therein" only refers to the real estate it seems that such instruments may be acknowledged in accordance with the law generally prevailing with respect to acknowledgments outside of the state. The case does not often arise because the party making the deed generally is the one who gives the security and is therefore right at hand to make the acknowledgment in the county or within the state. Although the Price Act does not so provide, it is clear that the deed is to be recorded in the recorder's office of the county where the lands lie.

Deed Must Conform to the Decree of the Court.

§ **237.** The deed must conform to the decree of the court, whether an order of sale or a confirmation as to premises, terms and purchaser. The return of the sale or the order of sale may be amended before deed is delivered by substituting another purchaser, as was done in Brennan's Estate,[69] and, in like manner, where a sale has been confirmed, there is no doubt that in a proper case the court will amend the decree before the delivery of the deed. If a deed is made to a person other than the purchaser specified in the decree, no title will pass.[70] Since, however, the jurisdiction of the court only extends to real estate, any reference to personal property in the deed is to be determined by principles other than those applicable to an Orphans' Court sale.[71]

(69) 220 Pa. 232 (1908).

(70) Thompson v. Rogers, 67 Pa. 39 (1871).

(71) In Backenstoss v. Stahler's Admr., 33 Pa. 251 (1859), there was an administrator's sale under proceedings in partition, and it appeared that there was a reservation of the growing crops made at the sale but no reservation of them in the deed. The administrator subsequently brought trover against the purchaser for the growing crops and it was held that he could recover since the purchaser had consented at the sale to the reservation, and since that reservation was as to personal property, it was competent for the parties to make a variation without obtaining the consent of the Orphans' Court thereto.

CHAPTER 16.

Collateral Attack.

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Preliminary Discussion of Collateral Attack.

§ **240.** The Price Act provides that the title of the purchaser shall be indefeasible by any person having a present or expectant interest, and be unprejudiced by any error in the proceedings. This provision of the act must be read in conjunction with the general law governing the validity of Orphans' Court sales, and in the light of the principle that the Orphans' Court is a court of limited jurisdiction and outside of this jurisdiction its decrees have no force whatever.[1] The true application of this section may therefore best be discovered by considering together the cases on collateral attack on Orphans' Court decrees whether arising under the Price Act or some other act. These cases may be arranged under the following headings:

Former Law as to Decrees of the Orphans' Court.

§ **241.** The decrees of the Orphans' Court were formerly considered to be of a nature inferior to the decree or judgment of a

(1) See § 13, ante.

court of record, and consequently were frequently examined and set aside on very slight grounds in collateral proceedings.[2]

Present Law as to Decree of the Orphans' Court.

§ **242.** The Act of March 29, 1832,[3] establishes the Orphans' Court as a court of record, and provides that its proceedings and decrees as to all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court but shall be liberal to reversal anly on appeal, since which act the early rule no longer obtains. The decree of the Orphans' Court may, however, still be set aside in a collateral proceeding, and it is of great importance to know what the law is on this subject.

Decree Valid Notwithstanding Irregularities.

§ **243.** The decree of the Orphans' Court authorizing a sale will be held conclusive in an action of ejectment notwithstanding irregularities in the proceedings for the sale.[4]

(2) The early view is illustrated by the case of Huckle v. Phillips, 2 S. & R. 4 (1815), where an action of ejectment was brought by the heirs of a decedent against defendant claiming under Orphans' Court sale, which action was brought twenty-five years after the sale. The judge left it to the jury to say (which was affirmed on appeal) whether there was sufficient ground for the exercise of the equitable jurisdiction of the court in ordering a sale on the ground of insufficiency of debts, and to raise money to educate a minor child. See also Lessee of Snyder v. Snyder, 6 Binney 483 (1814). As to proof of Orphans' Court sale, see Rahm v. North, 2 Yeates 117 (1796), suit for purchase money; Huckle v. Phillips, 2 S. & R. 4 (1815); M'Donald v. Campbell, 2 S. & R. 473 (1816).

(3) P. L. 190, Sec. 2. The provisions of the act are as follows: "The Orphans' Court is hereby declared to be a Court of Record, with all the qualities and incidents of a Court of Record at common law; its proceedings and decrees, in all matters within its jurisdiction, shall not be reversed or avoided collaterally in any other court, but they shall be liable to reversal, modification, or alteration, on appeal to the Supreme Court, as hereinafter directed."

(4) Decree held conclusive in these cases: Klingensmith v. Bean, 2 Watts 486 (1834), sale made after the term to which the order was returnable. Dixcy's Exrs. v. Laning & Sill, 49 Pa. 143 (1865), failure to enter bond. Lockhart v. John, 7 Pa. 137 (1847), failure to enter bond. Painter v. Henderson, 7 Pa. 48 (1847), where there was an error in partition proceedings, to-wit, assignment of land to widow at valuation when act of assembly allowed assignment to heirs only. Fox v. Winters, 4 Rawle 174 (1833), no final account confirmed. Snyder v. Markel, 8 Watts 416 (1839), accord. See, however, Lessee of Larimer v. Irwin,

In Potts v. Wright,[5] there was an administrator's sale under pluries order of the Orphans' Court and the purchaser, brought ejectment against the heirs twenty years after the sale. The heirs contended in defence (1) fraud between administrator and purchaser of which there was no proof, (2) adverse possession of defendant, (3) Orphans' Court had no jurisdiction to decree an alias or pluries order to sell until decree of confirmation of first sale was set aside. (This point not passed on in Supreme Court.) (4) Administrator filed no bond. Judgment for defendant in court below was reversed on appeal, the Supreme Court saying all irregularities were cured by the decree which could not be impeached.

In West v. Cochran,[6] a mortgage of minor's interest in real estate was made by guardian. In an action of ejectment by the mortgagee it was held that the mortgage was valid under the Act of 1853, even though a prior order to an administrator c. t. a. to sell the same premises was opened and undetermined, and even though the guardian's petition contained no description of the real estate and no list of creditors was annexed, as this omission was supplied by reference to the prior proceedings. The interest of the minor was subject to debts of a decedent, and the mortgage was to raise money to pay off these debts.

In Templeton v. Lehigh & Wilkes-Barre Coal Co.,[7] the plaintiffs, who claimed under the decedent, brought an action of ejectment against the purchaser at an administrator's sale under a private Act of April 2, 1853, P. L. 285. The purchaser was a railroad company who had bought a right of way. Although no release or deed for the right of way was found, judgment was entered for the defendant. Suit was brought here fifty years after the sale, and the court said that the fact that no deed was delivered was immaterial, the money having been paid.

4 Binney 104 (1798), contra, criticized by Duncan, J., in McPherson v. Cunliff, 11 S. & R. 422 (1824), and explained by Tilghman, C. J., in Huckle v. Phillips, 2 S. & R. 4 at 7 (1815).

(5) 82 Pa. 498 (1876), s. c. 34 L. I. 148, 24 Pitts. L. J. 125, 5 Law Times O. S. 35, 9 Lanc. Bar 14.

(6) 104 Pa. 482 (1884), s. c. sub. nom. West v. Cochrane, 41 L. I. 330, 31 Pitts. L. J. 373.

(7) 50 Super. Ct. 341 (1912).

Party in Interest Without Notice May Impeach.

§ **244.** The law is also clear that a party in interest who has had no notice of the proceedings may impeach the decree in a collateral action. This principle applies to the Common Pleas as well as to the Orphans' Court.

In McPherson v. Cunliff,[8] where the decedent died leaving children supposed to be legitimate, and, on that assumption, guardians were appointed who made an Orphans' Court sale for support and maintenance. Twenty years later one of the illegitimates discovered the legitimate children and procured a conveyance of their interest, and it was held that he could not recover in ejectment against the purchaser. Non constat, however, that they could not have recovered. The plaintiff obtained the conveyance for a very small sum and the lot had valuable improvements put there by the defendant, and it is clear that it was inequitable and unjust for him who had been a party to the sale to contest its validity on the ground of a right which he had afterwards acquired.

In McKee v. McKee,[9] a petition was presented by a purchaser to decree specific performance of a parol contract for the purchase of land made with the decedent, which petition might be construed as under the Act of February 24, 1834,[10] The decree of the court was not in accordance with the provisions of the statute and no notice was given to the heirs of the decedent. The purchaser took no title and consequently the heirs of the intestate succeeded in an action of ejectment against him.[11]

In Taylor v. Hoyt,[12] there was an action of ejectment, by a tenant in common who had been absent and not notified of the proceedings, against a purchaser at the sale, proceedings being under the Price Act, and judgment was entered for the plaintiff.

In Spencer v. Jennings,[13] ejectment was brought by heirs against purchaser at sheriff's sale who had bought under proceedings on a mortgage executed under order of the Orphans' Court. The proceedings to mortgage had been intended to be

(8) 11 S. & R. 422 (1824).
(9) 14 Pa. 231 (1850).
(10) P. L. 70.
(11) See 58 U. of Pa. Law Rev. 455.
(12) 15 Atl. Rep. 892 (1888), s. c. 2 Mona. 206.
(13) 114 Pa. 618 (1886), s. c. 19 W. N. C. 10, 44 L. I. 230, 34 Pitts. L. J. 243, 123 Pa. 184 (1889), 139 Pa. 198 (1890).

under the Act of 1853 but were not correctly drawn either under that act or the Act of 1832. The mortgage which was for $700. was foreclosed and the widow received over $2,000 from the proceeds of the sale after paying the amount of the mortgage. The mortgage was executed by the widow individually, and the Orphans' Court proceedings were merely referred to in the body of the mortgage. The court said that if the court had no jurisdiction upon the petition of the administratrix, which it did not have, it had no jurisdiction to appoint a guardian ad litem, and the children were therefore not in court, consequently had no notice of the sale, and their interest was not properly divested. This is the real ground of decision. Furthermore, the minors received no benefit of the sale and the widow ran away with nearly the entire proceeds.[14]

In Grindrod's Estate,[15] where a sale had been made to bar contingent remainders, a minor who had failed to receive notice petitioned to have the sale set aside on that ground, and the petition was refused, the court saying that the remedy was by ejectment against the purchaser.

In Perrine v. Kohr,[16] ejectment was brought by legitimate children against purchasers at partition sale under proceedings instituted by illegitimate children, and of which the plaintiffs, the legitimate children, had no notice. Proceedings were in the Orphans' Court and judgment was entered for the plaintiffs. The record did not disclose the illegitimacy of the petitioners in the Orphans' Court proceedings.

In Mitchell v. Spaulding,[17] ejectment by purchaser at sale by committee of a lunatic under proceedings in the Common Pleas.[18] No notice was given to the next of kin, and it was held that the sale was void and no title passed. After thirty years, however, the record of the proceedings being lost, notice to the contingent remaindermen will be presumed and judgment will be entered for the defendant in an action of ejectment by them against the purchaser's title.[19]

(14) See remarks of Clark, J., in 123 Pa. 124 (1895).
(15) 140 Pa. 161 (1891).
(16) 20 Super. Ct. 36 (1902).
(17) 20 Super. Ct. 296 (1902).
(18) Under the Act of June 13, 1836, P. L. 592, Secs. 22, 24.
(19) Smith v. Schwarz, 209 Pa. 79 (1904). This was an action of ejectment by contingent interests barred by the sale against the pur-

So also proceedings in partition in the Orphans' Court are void as against parties who have had no notice, which defect may be set up in collateral action of ejectment,[21] and the proceedings will be opened and the decree set aside on proper application.[22]

In Bennett v. Hayden,[23] there was a sale of the real estate of a lunatic under the Act of June 13, 1836,[24] which was void for want of notice to the heirs of the lunatic, and it was held that the widow and heirs could succeed in an action of ejectment against the purchaser.

Decree Conclusive of Facts Set Out in Record.

§ **245.** The decree of the Orphans' Court, furthermore, is conclusive of all facts set out in the decree or necessarily found by the entering thereof, and no evidence can be introduced in the collateral proceeding to impeach the decree on that ground. This principle is illustrated by as number of cases, as follows:

In Selin v. Snyder, [25] there was ejectment by the heirs of a decedent against a purchaser at Orphans' Court sale. The records show that all administrators had petitioned for the sale, and it was held that evidence could not be introduced to impeach the record and show that one of the administrators was never consulted and never consented to the sale of the land, and therefore the action of ejectment failed.

In Morrison v. Nellis,[26] ejectment was brought by the heirs against defendant claiming under the purchaser at an Orphans' Court sale. The sale was by the guardian, the petition setting out the nature of the title to the minor's interest in one-half of the lot, that it would be to the interest of said minors to sell the same, that a co-tenant had offered a certain sum which the pe-

chaser. The papers in the case had been lost, and it was presumed that notice was given and that the proceedings were regular. See McGuirk v. Friel, 9 Del. Co. 22 (1906), where the record did not show legal notice, but the court found there was actual notice. Ejectment brought twenty years after the sale.

(21) Messinger v. Kintner, 4 Binney 97 (1811); Richards v. Rote, 68 Pa. 248 (1871).

(22) Swan's Est., 238 Pa. 430 (1913).

(23) 145 Pa. 586 (1892).

(24) P. L. 589, Secs. 22, 24.

(25) 7 S. & R. 166 (1821).

(26) 115 Pa. 41 (1887), s. c. 19 W. N. C. 20, 44 L. I. 187, 34 Pitts. L. J. 274, 14 Lanc. L. R. 96.

titioner regarded as a reasonable price, and better, under the circumstances, than could be obtained at private sale. Judgment was entered for the defendant, the sale passing a good title. The question whether the sale was actually for the interest of the minor was for the Orphans' Court, and their judgment thereon was conclusive.

In Sager v. Mead,[27] ejectment was brought by heirs of the intestate against the purchaser at Orphans' Court sale sixteen years after the sale, which was for the payment of debts of the decedent. The contention was that the sale was not necessary and that the land was sold for less than its actual value. The allegations were not proved and judgment was for the defendant. It is apprehended that in this case, even if the allegations were proved the heirs could not succeed. The decree of the court was conclusive as to these points.

In Grubb v. Galloway,[28] there was an administrator's mortgage for the payment of debts, and an averment in the petition (1) that the decedent died within the time fixed for the lien of the debts, which averment was false, (2) of the existence of debts. It was held in subsequent proceedings by the mortgagee upon the mortgage that the decree was a conclusive adjudication of the fact of death within the time prescribed, and that the decree could not be attacked on the ground that the schedule of debts in the petition exhibited such looseness or irregularity as to put the mortgagee upon inquiry as to the actual facts. It appeared, however, that the amount of money borrowed on the mortgage was not needed to pay the debts, and the proceeds of the mortgage were used, with the consent, knowledge and participation of the mortgagee, in paying claims which were invalid against the decedent. Mitchell, J., who delivered the opinion in the Supreme Court, paid no attention to these circumstances, and on this ground the decision is open to serious objection. The heirs had no notice, which notice was not required by statute, and the Supreme Court went on the ground that the decree of the Orphans' Court was a conclusive adjudication that the debts were the debts of the decedent, and that the mortgagee was justified in relying on that in paying out the money.[29]

(27) 171 Pa. 349 (1895).
(28) 203 Pa. 236 (1902).
(29) See § 45, ante.

In Swift v. Harbison-Walker R. C.,[30] the title had been acquired by deed. Proceedings were under the Price Act in the Common Pleas. A bill was filed by parties evidently having contingent remainders against the purchaser at the sale. It does not appear how the title could be drawn in question in this proceeding in equity. Leaving that aside, the plaintiffs had no standing because the contingency upon which they were to take had not yet happened so that even if the sale were void they would have no claim. The case was one of a sale to bar contingent remainders. The court also said that the case arising 25 years after the decree of sale, it must be assumed, in the absence of anything to the contrary disclosed, that the court performed the duties of investigation imposed by the act and required the petitioners to comply with the provisions of the statute.

In Gallaher v. Collins,[31] an action of ejectment was brought by the purchaser at Orphans' Court sale for the payment of debts against son of the decedent in possession. Defendant claimed that the sale was void because there were no debts, as he had arranged to take up the debt for payment of which the sale was made. His arrangement, however, was made without knowledge of the parties that it was to have such an effect, and he had failed to object to the confirming of the sale of which he had notice. Judgment was entered for the plaintiff.

In Cierlinski v. Railways,[32] ejectment was brought by the guardian of a minor child for land which had been set out to the widow as part of her exemption. Defendant claimed under the widow's title. Judgment was entered for the defendant. The widow had remarried and thus lost her right to the exemption, and the fact of her remarriage was set in the petition for exemption. The Orphans' Court decree was conclusive of all facts, the determination as to her remarriage was final and conclusive. Under this case, if the court should erroneously find the date of the death of the decedent, that fact would be conclusive and the heirs would have no remedy.

In Patchin v. Seward Coal Co.,[33] a sale was made under the order of the Common Pleas of Westmoreland County of land

(30) 228 Pa. 584 (1910).
(31) 7 Watts 552 (1838).
(32) 225 Pa. 312 (1909).
(33) 226 Pa. 159 (1910).

in that county upon petition of the committee of a lunatic resident of Clearfield County where he had been declared a lunatic, and the committee was appointed, to which court petition was first presented for an order to sell. The sale was for the payment of debts and the maintenance of the family of the lunatic. Ejectment was brought seventeen years after the sale by the heirs of the lunatic against the purchaser's title, and it was held that judgment should be given for the defendant. The irregularities which were said to exist, and which might justify setting the sale aside could not be set up in a collateral proceeding, and evidence was need inadmissible to show that notice had not been given as alleged in the record.

Party in Interest who had Notice Cannot Impeach.

§ **246.** Where a party in interest has had notice of the proceedings, it is his duty to object to any defect therein, and if he fails to do so, he cannot afterwards take advantage of such defect in a collateral proceeding, and particularly is this so when he has received the benefit of the sale.

In Maple v. Kussart,[34] a husband and wife were seized of an estate by entireties, and the husband made a will disposing of the entire estate, directing a sale thereof, and died. The entire estate was sold by the executors under the order of the Orphans' Court, there being no one named to execute the power, thus ignoring the estate by survivorship in the widow. The widow, however, received her share of the proceeds of the sale in accordance with the terms of the will and encouraged the sale. In ejectment by her heirs after her death, against the title derived at the sale, a verdict for the defendants was affirmed. The court put the case on the ground of estoppel and the receipt of the purchase money.

In Jacoby v. McMahon, [35] there was a sale by an administrator for payment of debts at private sale[36] which was otherwise regular. The proceeds of the sale were applied to the payment of the debts and other land relieved from the lien. It was held that the heirs could not after eight years succeed in ejectment against the purchaser at the sale. The court relied largely on the cir-

(34) 53 Pa. 348 (1867).
(35) 174 Pa. 133 (1896), s. c. 189 Pa. 1 (1898).
(36) See the Act of June 12, 1893, P. L. 461.

cumstance that the son and heir was in court and did not object, and received the benefit of the proceeds of the sale.

In Phillips v. Crist,[37] the executor who had sold the land of the decedent at an Orphans' Court sale, brought an action of ejectment against the purchaser apparently in his own right. It was held that he was estopped by his representations at the sale and his deed to defendant from claiming in his own right any land within the lines of the deed.

Where Record does not Show that the Court had Jurisdiction, the Decree May be Impeached.

§ **247.** In the case of an executor's or administrator's sale for the payment of debts, the law is clear, that if it appears from the facts in the petition that the debts have lost their lien or it does not clearly appear that there are debts or that the lien is still subsisting, the sale will confer no title on the purchaser, and the purchaser or those claiming under him cannot set up the decree in an action of ejectment against them by the heirs or devisees.[38]

In Halderman v. Young, [39] the Common Pleas appointed a committee of a lunatic under the Act of April 20, 1869,[40] which act did not confer jurisdiction over the property of the lunatic.[41] The committee thus appointed sold the lunatic's real estate under order of court, and it was held in an action of ejectment by the former lunatic against the purchaser at the sale that the decree was valid and no title conferred. The court said that the case was not helped by the Act of April 28, 1876,[42] which only applies to cases of irregularity in appointment or want of proper qualifica-

(37) 33 Super. Ct. 445 (1901) S.

(38) Torrance v. Torrance, 53 Pa. 505 (1866); Smith v. Wildman, 178 Pa. 245 (1896), s. c. 194 Pa. 294 (1900); Smith v. Ribblett, 233 Pa. 300 (1912). In Truby v. Steele, 45 Super. Ct. 152 (1911), the sale was valid even though the lien had expired, as there were administration expenses to be paid.

(39) 107 Pa. 324 (1885).

(40) P. L. 78.

(41) See Halderman's App., 104 Pa. 251 (1883). The appointment was void and could not be helped by resorting to the general equity powers of the Common Pleas over persons non compos mentis because those powers can only be exercised in accordance with the statute.

(42) P. L. 50.

tion and not therefore to the defect in the case at bar, which was a total want of jurisdiction.

The Fact that there is no Decree May be Set up in a Collateral Action.

§ **248.** The circumstance that there is no decree may, of course, be set up in a collateral action. Thus, in Barger v. Cassidy, [43] an administrator presented a petition for a mortgage to pay debts of the intestate. The court made an order for the mortgage but no decree of confirmation. The administrator gave a bond and warrant of attorney with the mortgage, upon which judgment was entered and the land sold, and in ejectment by the purchaser it was held that his title was void except as to the title of the administrator in her own right. The special order to mortgage did not confer power to confess judgment.[44]

In Kreimendahl v. Neuhauser,[45] there was a guardian's sale of a minor's undivided interest under Act of 1853. The order of sale had been made but no bond had been filed, and the guardian had made no return to the order of sale, and there was, therefore, no confirmation thereof. The minor, furthermore, never received any of the proceeds of the sale, the guardian having never accounted therefor. The minor, on coming of age, brought ejectment against the purchaser and recovered. In this case there really was no decree to impeach, the sale having been carried out bfore the Orphans' Court proceedings were completed.

In Morgan's App.,[46] an administratrix had made a mortgage for the payment of debts, an order having been made authorizing the mortgage but no return to the order. Proceedings were begun upon the mortgage, and a bill in equity in the Common Pleas was filed by the administratrix and guardian of a minor child, and it was held that equity would intervene to prevent proceedings on the mortgage but would not direct cancellation as the mortgagees could still apply to the Orphans' Court and have the mortgages confirmed upon notice to all parties and an adjustment of all equities.

Parol Evidence.

§ **249.** Parol evidence may be introduced to vary or explain

(43) 4 Phila. 324 (1861), s. c. 18 L. I. 316.
(44) See § 47a, ante.
(45) 13 Super. Ct. 606 (1900).
(46) 110 Pa. 271 (1885).

the proceedings when there is a latent ambiguity. Thus in Pringle v. Rogers,[47] there was an action of ejectment by devisee against the purchaser at the sale, and it was held that parol evidence was admissible to explain the description in the deed, the distances therein to be governed by the monuments on the ground, and the deed was corrected accordingly, in consequence of which a small strip of ground was found to have been left unsold although apparently included in the description in the deed, for which the plaintiff recovered judgment according to her interest under the will. Where, however, the record is plain, no evidence is admissible.

In King v. Gas Coal Co.,[48] there was an action of ejectment by devisees against defendant claiming under purchaser at Orphans' Court executor's sale for payment of debts. The controversy was over what was conveyed by the executor's deed, and it was held that parol evidence was not admissible to explain the description in the deed because the language used was clear and left no doubt as to what property was sold or conveyed by the proceedings, there being property in existence to which the description accurately applied.

In the case of McGhee v. Hoyt,[49] the petition described the land correctly, and the deed incorrectly, the property having been sold by an administrator for the payment of debts. It was held in an action of trespass forty years after the sale that the description in the petition governed and the deed was to be considered as corrected accordingly.

Fraud.

§ **250.** An Orphans' Court sale may always be impeached in a collateral action for fraud.[50]

Mistake.

Preliminary.

§ **251.** Mistake in an Orphans' Court sale may be of two kinds, unilateral, that is, where one of the parties has made a mistake not participated in by the other, and mutual, where both

(47) 193 Pa. 94 (1899).
(48) 204 Pa. 628 (1903).
(49) 106 Pa. 516 (1884), s. c. 41 L. I. 399.
(50) Snyder v. Snyder, 6 Binney 483 (1814); Selin v. Snyder, 11 S. & R. 319 (1824).

parties have made the same mistake. The mistake may be as to the title sold, the jurisdiction of the court, etc.

Unilateral Mistake.

§ **252.** It seems clear, although no authority for the proposition has been found, that if one of the parties, say the purchaser, participates in the sale under some mistaken idea as to the title or the jurisdiction of the court, that he cannot be heard to set up that mistake in a subsequent collateral action. The force and effect of the decree must be determined by the record, irrespective of any mistaken idea of any of the parties as to the same.[51]

Mutual Mistake.

§ **253.** Where both parties participate in the same mistake, the mistake is also unavailing as against a collateral attack, even where the parties seeking to set aside the decree of the court participate in the mistake. This follows from the principle that no jurisdiction can be conferred by consent.

In Paul v. Squibb, [52] there was an estate by entireties, and the husband having died intestate, his administrators sold the property under the order of the Orphans' court for the payment of debts, and it was held that the title of the widow as survivor was not divested although she knew of the sale, and her heirs were allowed to recover in ejectment against the defendant claiming under the purchaser at the sale. All parties were ignorant of the real state of the title. As said by the court "she assented to a sale of her husband's title, not her own, of which she was ignorant." She had no share in the receipt of the purchase money, acquiring no benefit from the sale.

The court had no jurisdiction to order the title of the widow sold because it was not liable for the debts. That jurisdiction would not have been conferred had the parties knowingly consented to the sale. A fortiori there was no jurisdiction where they unknowingly consented. The widow was not estopped because she received no part of the purchase money. This case is to be distinguished from Maple v. Kussart,[53] because in that case

(51) The purchaser may, however, obtain relief by attacking the decree of the court below. See 219, ante.

(52) 12 Pa. 296 (1849).

(53) 53 Pa. 348 (1867).

although the power which was exercised under direction of the court did not extend to the widow's title, yet she assented to the sale and received her share of the proceeds, and consequently was in the same position as if she had joined in the deed and conveyed her title.

Statement of the Law in Pennsylvania as to Collateral Attack Upon Orphans' Court Sales.

§ **254.** It seems from a consideration of the cases we have cited in the foregoing discussion that a decree of the Orphans' Court may be attacked in a collateral action only in one of two cases: first, where the record does not show that the case in which the court assumed to act was one of the cases provided for by a statute conferring jurisdiction upon the court. If the jurisdiction of the court in any such case depends upon the existence or non-existence of certain facts, as, for instance, in the case of a sale for the payment of debts, the fact that the decedent has not been deceased for more than two years, that fact must appear on the record, otherwise the court has no jurisdiction. The other case is that where a party in interest who is entitled to notice has not received notice of the proceedings in the Orphans' Court. It is perfectly clear that a man's title may not be divested by judicial proceedings of which he has had no notice. Such a person may proceed afterwards to assert his title and the decree of the court authorizing the sale cannot be set up against him. The difficulty here is that since the Orphans' Court decree is conclusive of all facts set out in the record, a case may arise where the record will show a notice to an individual which notice was not in fact given, that is, the record will contain a false averment. Now the principle here is that the falsity of that averment cannot be shown, and in such a case the person who failed to receive the notice upon bringing an action to assert his title would be met with the decree of the court showing the notice, and his case would fail. There is an apparent injustice here which, however, disappears when we reflect that an Orphans' Court sale can always be set aside in a collateral action because of fraud. The case of a false averment as to notice will nearly always be a case of fraud, and the person whose title has been divested may obtain relief under this principle.

CHAPTER 17.

Discharge of Liens by Sale Under the Act.

General rule as to judicial sales ..... § 257
Distinction between Orphans' Court sales and sheriff's sales ..... § 258
Effect of public sale under the act ..... § 259
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Liens
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Debts of decedent ..... § 267
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Ground Rents ..... § 269
Agreement of parties as to disharge of liens ..... § 270

Preliminary.

General Rule as to Judicial Sales.

§ **257.** The sale under the provision of the act is a judicial sale and subject to the general rule applicable in such cases, which is that a judicial sale discharges all liens except (1) where liens are created by last will and testament as permanent provisions for wives and children, (2) where from the nature of the incumbrance it will not readily admit of valuation, and (3) where it is plain from the agreement of the parties that the encumbrance was intended to run with the land,[1] (4) where liens are specially saved by statute. The provisions of the act, therefore, that by a public sale the premises shall be discharged of all liens, is merely declaratory of the existing law.[2]

Distinction Between Sale Under the Act and Sale by the Sheriff.

§ **258.** There is this distinction to be noted between a sale under the act and a sale by the sheriff under execution issuing out of the Common Pleas. In the latter case, the sale is always on some lien or encumbrance against the land, and there are

(1) Levengood's Est., 38 Super. Ct. 491 (1909).
(2) See Henry Wharton, 6 W. N. C. at 549.

several questions involved: (1) as to the discharge of liens subsequent to the one under which the sale is made, (2) as to the discharge of liens prior to the one on which the sale is made. A sale under the Price Act, however, is always ordered independently of and not under a lien, and the question, therefore, is which of the liens against the property at the time of the sale are discharged thereby. It must be remembered that the proceeds take the place of the land, and that the selling price of the property as a whole is considered as diminished to the extent of the encumbrances that remain and are not discharged. It is comparatively easy, therefore, to make a settlement in every case where a purchaser buys in ignorance of the existing encumbrances which remain, and where the application is made in time, the court will by proper decree protect the purchaser.[3]

Effect of Public Sale Under the Act.

§ **259.** The act provides that by every such public sale the premises sold shall be discharged of all liens. The open question is whether this language is to be literally applied or whether the effect of a public sale under the act is to be limited by the general rules relating to the effect of judicial sales in general and Orphans' Court sales in particular, and by the several statutes which may relate to any particular lien, which may have been adopted subsequent to the passing of the Price Act.

Effect of Private Sale Under the Act.

§ **260.** The act contains no provision as to the effect of a private sale in discharging liens other than the clause that the sale shall discharge the lien of debts of a decedent except debts of a decedent of record and debts secured by mortgage.[4] It is clear that the court can not make a private sale have any greater

(3) Where the liens are not discharged by the sale the purchaser will be protected by requiring them to be deducted out of the purchase money, Moorehead v. Wolff, 123 Pa. 365 (1889), s. c. 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261. Dictum Penn Sq. Bldg. Assn. App., 81½ Pa. 330 (1876), per curiam at 332.

(4) See Act of March 23, 1867, P. L. 43, which provides as follows: "Section 2. That private sales, made by order of court, under the said Act of the eighteenth of April, one thousand eight hundred and fifty-three, shall discharge the premises sold from the lien of the debts of the decedent, except debts of record, and debts secured by mortgage: Provided, That the security, required by said act, shall have been duly entered.

effect than a public sale, and therefore the only question as to a private sale is, whether it will have as great an effect as a public sale in discharging liens. No case on this point has been found.

Every private sale is perhaps without exception reduced to a written agreement between the parties, which is usually expressed as being subject to the approval of the court in cases where it is necessary to have the sale confirmed. The effect of the sale, therefore, as to liens and encumbrances depends on the terms of the agreement and the nature of the liens and encumbrances, just as in the case of any other sale of real estate.[5] Our discussion of the cases, therefore, will be principally confined to those of a public sale. It is convenient to arrange the discussion under the readings corresponding to the various liens which may arise.

Mortgages.

§ **261.** If the mortgage is a debt of record of the decedent, it is not discharged by a private sale,[6] and this seems to apply whether the mortgage is a first or other lien. If the sale is public, it is discharged by the provisions of the Price Act unless saved

(5) This is illustrated by the decision in Kayser's Est., 9 D. R. 360 (1900), where there was an agreement of sale by trustees made on May 21, 1897, subject to the approval of the Orphans' Court. On May 11th, ten days before the date of the agreement, the city had let a contract for building a sewer in the street in front of the premises. The work on this sewer was begun on May 27, the order of sale was granted on June 15, the work was completed on June 14, and on June 23 the deed was executed and tendered. The agreement called for a title clear of all encumbrances, and both parties were ignorant of the sewer lien. It was held that the lien began under the statute on June 14, 1897, at which time the vendee was in equity the owner, his title having been properly acquired under the agreement of sale, and that therefore the property was free of encumbrances when he acquired title, and the cost of the sewer was to be paid by the vendee. This is a decision similar to one which will be reached whether the sale was subject to the approval of the Orphans' Court or not.

(6) Moorehead v. Wolf, 123 Pa. 365 (1889) s. c. 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261. This was a case of a private sale under the Price Act. Of course, if the mortgage was not due, the parties had to make the agreement of sale subject to it, and if it was due, it could effectually be discharged by paying it off at the settlement. See Penn Sq. Bldg. Assn. App., 81½ Pa. 330 (1876).

by the Act of May 8, 1901,[7] which may probably be considered as amending the Price Act. When the mortgage is due and payable it may in effect be discharged by agreement of the parties to pay it out of the proceeds at the settlement.

In Jerman v. Lyon,[8] the property was sold in 1863 at public sale under the Price Act upon a petition by all the heirs of the deceased intestate, praying for leave to sell clear of all liens,

(7) P. L. 141, amending the Act of May 19, 1893, P. L. 110, which amended the Act of March 22, 1887, P. L. 6, and Act of March 23, 1867, P. L. 43, Sec. 3, saves the lien of a mortgage from discharge when it is prior to all other liens except

Other mortgages
Ground rent
Purchase money due Commonwealth
Taxes, Municipal claims, Assessments } Not duly entered in court as a lien at the date of the mortgage
Taxes, Municipal claims, Assessments } Whose lien though afterwards accruing has by law priority to it

by any judicial or other sale whatsoever, whether made by

decree of the Orphans' Court
decree of any other court
any writ of execution
or otherwise howsoever,

with a proviso that the act shall not apply to mortgages on unseated lands or sales of the same for taxes.

"For the effect of the last Act (March 23, 1867, P. L. 43), being to preserve the lien of the mortgage, upon any such sale, is that the bond cannot be treated as a general debt on the distribution of the fund produced by the sale; indeed, standing alone it would not even authorize an application for a sale of the mortgaged property in the Orphans' Court. This is settled, and as the purchaser buys the land for just so much less, by reason of the mortgage, if this were all, the correctness of the decisions could not be questioned. Where, for instance, as is not infrequent, especially in the country, a man is the owner of a good deal of mortgaged land, but with a personal estate less than the mortgages, distribution is impossible till the mortgage has been sued out. In consequence of this the Act of 1867 has been repealed form time to time as to all the counties of this State, except Philadelphia and one other, where its consequences are not so injurious, and the interests of large investors are united in its favor; though even here it sometimes produces a deadlock. Henry Wharton, "Lien of decedent's debts in Pennsylvania," 6 W. N. C. 545 at 548-549 (1879).

(8) 81 Pa. 107 (1876).

and the sale was so made, but the purchaser took the conveyance subject to a mortgage which had been executed by the intestate, and the amount of which mortgage was deducted from the purchase money. The mortgage was sued out, and in an action of ejectment by the plaintiff, who was the purchaser at the Orphans' Court sale against the defendant who claimed under the sheriff's sale, judgment was entered for the defendant, the court saying that the sale under the Act of 1853 would have discharged the lien but the arrangement of the parties and manner of settlement prevented it.

Judgments.

§ **262.** Where a judgment is against the decedent, it is a debt of record and consequently not discharged by a private sale under the act. Where the sale is public, the lien thereof is probably discharged. No decision on this point has been found. Since a judgment is always due and payable, the parties may, in case of a private sale, provide for the case by a covenant by the vendor to convey clear of encumbrance.[9]

Legacies.

§ **263.** A legacy is discharged by a sale or mortgage under the Price Act.[10] In Randolph's Appeal,[11] there was an administrator's sale for the payment of debts and the maintenance of children. The sale was confirmed at a certain price. The ad-

(9) See § 260, ante. Public sale under the Act of March 29, 1832, P. L. 190, discharges the lien of judgments against the decedent. Dictum in O'Brian v. Wiggins, 14 Super. Ct. 37 (1900), s. c. 17 Lanc. L. R. 233, 14 York 54, affirming 8 D. R. 418, 22 Pa. C. C. 236, 16 Lanc. L. R. 143. Where there are life estates and remainders under a will and a sale by executors under the will, the question as to whether judgments against the life tenants are discharge by the sale was not decided in Moorehead v. Wolff, 123 Pa. 365 (1889), 23 W. N. C. 167, 36 Pitts. L. J. 352, 46 L. I. 261. Judgments against a co-tenant are discharged by the sale in partition proceedings in the Orphans' Court, Mehrten's Est., 41 Pa. C. C. 169 (1913). In Smith's Est., 8 Lack. L. N. 308 (1902), there was a mortgage by an executor to pay debts under order of the court. A controversy arose over distribution of the proceeds of the mortgage, and it was held that a judgment omitted from the list of debts in the petition was not thereby deprived of its claim to payment out of the fund according to priority.

(10) Lombaert's App., 99 Pa. 580 (1882).

(11) 5 Pa. 242 (1847).

ministrator varied the terms of the sale and agreed that certain legacies should remain charged on the land. It was held, nevertheless, that the lien of the legacies was discharged by the sale notwithstanding the arrangement. The case arose on an attempt by a legatee to enforce his claim against a fund raised by a subsequent sheriff's sale of the property.[12]

Collateral Inheritance Tax.

§ **264.** The lien of the collateral inheritance tax is probably discharged by an Orphans' Court sale, although there does not seem to be any very clear decision to this effect. In Penn Gaskill's Est. (No. 1),[13] there was a case where real estate had been sold under the Price Act, and the question was as to the commission to be charged by the trustees and the payment of the collateral inheritance tax. The question arose on audit of the account of the proceeds of the sale, and the court held that the trustee was bound to pay the tax to discharge the lien, but that the amount so paid should be properly apportioned between principal and income. This case seems to decide that the sale discharges the tax; because if it was not discharged, the trustee would not be authorized in paying it.[14]

(12) See also Herr v. Groff, 34 Pa. C. C. 65 (1907), where it was held that a charge by will was divested by sheriff's sale.

(13) 208 Pa. 342 (1904).

(14) See also remarks of Walling, P. J., in Culbertson's Est., 38 Pa. C. C. 491 (1911) at 493, s. c. 20 D. R. 1081 (1911), as follows: "In our opinion, the Commonwealth is entitled to the relief sought. The administrator is liable because he undertook to collect such collateral inheritance tax by sale of the land and he voluntarily paid the money over to the heirs without deducting the five per cent. due the state. The tax being against real estate, he would not be liable except that he undertook to collect it. Boyd's Est., 4 W. N. C. 510. The land having been sold at private sale, without any published notice, or other notice to the register of wills, or to the Commonwealth, such sale did not divest the statutory lien of the collateral inheritance tax. The statute provides that such tax shall remain a lien until paid. It might perhaps be divested by a judicial sale after proper notice. And a private sale of land for payment of debts pursuant to the Act of May 9, 1889, P. L. 182, to have the effect of a public sale under the Act of 1832, P. L. 190, must be advertised as said last-named act requires a public sale to be advertised. O'Brien v. Wiggins, 14 Super. Ct. 37."

Dower.

§ **265.** A dower charge is not discharged by Orphans' Court sale of the property out of which it issues.[15]

Taxes.

§ **266.** Municipal taxes assessed prior to the date of the sale, although for the year in which the sale was made, are not discharged by a private sale by a trustee confirmed under the act.[16] The Act of May 22, 1895,[17] provides that the lien of all taxes then or thereafter levied, etc., shall be divested by any judicial sale when the amount of the purchase money shall equal the amount of the taxes. Where the lien of taxes has expired by limitation, the purchaser at Orphans' Court sale acquires title free of the tax.[18]

Debts of a Decedent.

§ **267.** The lien of debts of record of a decedent is discussed under the heading of the various recorded liens which may represent the debt. If debts of the decedent are not of record, they are discharged by a public or private sale.[19] If the debts of the decedent are of record, they are expressly saved from discharge by a private sale.[20]

(15) Dech v. Gluck, 47 Pa. 403 (1864); Dull v. Slater, 31 Super. Ct. 488 (1906).

(16) In Steen's Est., 175 Pa. 299 (1896), aff. 17 Pa. C. C. 201, it was held that the city was not entitled to recover the amount of the tax out of the proceeds of the sale. This case proceeds upon the ground that the tax was a debt of record under the existing law and therefore saved by the Act of March 23, 1867, P. L. 43, which provides that a private sale under the Price Act shall discharge the lien of all debts of the decedent except debts of record, mortgages, etc. This leaves open the question as to taxes assessed against the premises after the date of the death. As the case arose before the Act of 1895, the court said that act did not apply. In McClurg's Est., 4 D. R. 655 (1895), the sale had been ordered divested of all liens and a claim of the City of Pittsburgh for the amount of a municipal lien for grading and paving was disallowed on audit of the trustees account of the fund, because the lien was not properly filed and therefore invalid.

(17) P. L. 111.

(18) Phila. v. Reeder, 30 Pa. C. C. 375 (1904).

(19) For a discussion of which, see § 113, ante.

(20) See § 125, ante.

Arrears of Interest.

§ **268.** Arrears of interest on any lien are also saved from discharge as they are part of the debt. Where there is an administrator's sale for the payment of debts, interest on the lien runs to the delivery of the deed and payment of the money.[21] There appears to be a distinction as to the payment of arrears of interest between the case where the estate is insolvent and where it is solvent, as to the time to which the arrearages of interest are to be computed. In Yeatman's App.,[22] there was an executor's sale for the payment of debts, the personal estate being insufficient, and on distribution of the proceeds, a holder of a mortgage executed by the decedent was allowed interest on the bond after the confirmation of the sale and until date of payment, the estate being solvent and the bond being that of the decedent.

In the case of Ramsey's App.,[23] there was an administrator's sale for payment of debts under order of court and an auditor appointed to distribute the fund raised by the sale. Lien creditors were awarded interest to the return day of the order of the sale and not to the day of payment. This was evidently a case of insolvency,[24] and the court went on the ground that interest ceases in the case of sheriff's sale from the time of the return and the confirmation of the sale. Mercur, J., in Carver's App.,[25] seems to think the court in Ramsey's App.,[26] were under the impression that the money was paid on the return day, it appearing that the sale was confirmed on that day.

In Campbell's Est.,[27] there was a distribution of the proceeds of sale of a decedent's real estate for the payment of debts. It appeared that the bond bore interest between the confirmation of the sale and the filing of the administrator's account. The auditor distributed the principal to the judgment creditors in the order of their liens and the interest pro rata among the same creditors. The report was confirmed, the court saying it was

(21) Ross's Est., 18 D. R. 429 (1908). Case arose on exception to adjudication. Report obscure.
(22) 102 Pa. 297 (1883).
(23) 4 Watts 71 (1835).
(24) Rowe's Est., 11 Kulp 32 (1904), accord.
(25) 89 Pa. 276 (1879) at 277.
(26) 4 Watts 71 (1835).
(27) (No. 1) 22 Super. C. 430 (1903).

an error to distribute the interest first to the satisfaction of a judgment not fully paid from the principal and the residue to a later judgment not reached. The estate was apparently insolvent. Decree is open to criticism.[28]

Ground Rents.

§ **269.** It seems that a ground rent may not be discharged by an Orphans' Court sale. The ground rent is an estate in the land, and whether redeemable or irredeemable remains until released by conveyance from the owner of the land. The arrearages of ground rent are probably subject to the same rule as interest on mortgages and other encumbrances, and may be discharged by a sale when the ground rent itself would not be.

In Bickley's Adm. v. Biddle,[29] there was a bill in equity in the Common Pleas by an administrator against a purchaser at Orphans' Court sale for specific performance, the sale not having been confirmed. The bill was dismissed, the court saying the jurisdiction was exclusively in the Orphans' Court. The purchaser objected to a ground rent and building restrictions, the sale having been made clear of all encumbrances. The court said, by way of dictum, that he could not defend under the rule of caveat emptor.[30] The dictum is open to objection.

Parties May in Certain Cases by Agreement Alter the Effect of the Sale as to Discharge of Liens.

§ **270.** The parties may by agreement make the sale subject to any lien or encumbrance which would otherwise be discharged or provide for the extinguishment of an encumbrance or lien which would not be discharged if the owner thereof consents.

It is not lawful to sell as if there were no encumbrances, but the sale being made for the full value, it obviously makes no difference whether the encumbrances are allowed to remain and settlement made for the equity, or whether the whole purchase money is collected and the encumbrance paid off out of it.

Thus, in Crosson's App.,[31] the administrator settled with the

(28) As to interest in case of assignee's sale, see Brownsville Bank's App., 96 Pa. 347 (1880); Tomlinson's App., 90 Pa. 224 (1879).

(29) 33 Pa. 376 (1859).

(30) Howe's Est., 14 Pa. C. C. 574 (1894), s. c. 3 D. R. 267.

(31) 125 Pa. 380 (1889), affirming 6 Pa. C. C. 14 (1888). See explanation of the misleading syllabus by Mitchell, J., in Kreamer v. Fleming, 191 Pa. 534 (1899) at 538.

purchaser deducting the liens, mortgages and ground rents. It was held, all parties having acquiesced, that the administrator would not be surcharged on the filing of the account with the amount of the encumbrances, although the court said the sale might well have been set aside. This illustrates the proposition that the decree as to price is conclusive, and where it appears that at the settlement the equity in the property was settled for, it is sufficient.

In the case of a mortgage for payment of debts under Act of March 29, 1832,[32] the lien of prior mortgages may be discharged with the consent of the holders thereof.[33] Liens discharged by judicial sale may be saved where the sale is made on the express condition that the lien shall be a continuing charge.[34]

(32) P. L. 190.
(33) Laughlin's Est., 23 W. N. C. 544 (1889).
(34) Nowry's Est., 20 Pa. C. C. 76 (1897), sheriff's sale.

CHAPTER XVIII.

Appeals.

§ 271. The act provides[1] that appeals may be taken in all proceedings under the act to the Supreme Court.[2]

Notice of the appeal must be given to the vendee, mortgagee or lesee, otherwise reversal of the decree will not affect his title, and twenty days shall be allowed in which to perfect the appeal. This provision obviously allows an appeal by the person carrying out the decree of the court or by any other person interested including the vendee, mortgagee or lessee. The effect of the provision as to the latter is that their title is not affected if the decree be reversed on an appeal by any other party after twenty days shall have elapsed from the entry of the decree and no written notice thereof be given. An appeal, therefore, in such case must be taken within twenty days of the date of the decree, or if after twenty days before the decree shall be carried into effect, and in either case written notice must be given to the vendee, mortgagee or lessee, otherwise a reversal of the decree will have no effect on the title passing thereunder. It is always safer, therefore, when there is any doubt to wait twenty days after the decree before completing the sale, mortgage, lease or conveyance on ground rent.

(1) "Sec. 8. That in all cases and proceedings under this act, appeals may be taken to the Supreme Court from the Orphans' Couprt, as now provided by law in other cases, and in the Court of Common Pleas, as provided in equity cases, in the respective counties of the State. Provided, That if any decree be carried into execution before the appeal be perfected, and written notice thereof given to any vendee, mortgagee, or lessee, any reversal thereof shall not affect the right or title of such vendee, mortgagee or lessee, but the purchase or mortgage money or rents shall stand in lieu of the premises sold or mortgaged, or leased, so far as thus encumbered: Provided further, That before any decree be carried into effect to afford such indemnity, twenty days be allowed from its entry to take and perfect such appeal."

(2) This provision is, of course, qualified by the legislation establishing the Superior Court and designating the cases in which appeals shall be taken to that tribunal. Act of June 24, 1895, P. L. 212, amended by the Act of May 5, 1899, P. L. 248, confer Act May 19, 1897, P. L. 67, as to practice in the matter of bail, costs and fees on appeal.

For convenience of reference, a few cases have been collected in the note illustrating the various orders and decrees in the Orphans' Court which are not appealable.[3]

(3) Order directing sale not appealable, Grim's App., 33 Sup. Ct. 587 (1907); Bucknor's App., 4 Walk. 331 (1884); Snodgrass's App., 96 Pa. 420 (1880), overruling Hess's App., 1 Watts 255 (1832). Consequently, where property is sold pending the appeal from the order of sale, the purchaser will take a good title and may recover in ejectment, Robinson v. Glancy, 69 Pa. 89 (1871). Order directing an executor to make return to the court of an order of sale of real estate for the payment of debts, granted upon his application and upon decree confirming the sale to execute and deliver to the purchaser a proper deed of the premises interlocutory not appealable by the executor, and his appeal was quashed on motion by the purchaser, Walker's Est., 25 Super. Ct. 256 (1904). Probably a distinction is to be drawn where the order directs an executor to exercise a power under the will, as to making a sale. In such case an appeal was entertained in Douty's Est., 196 Pa. 432 (1900). In Badder's Est., 5 Super. Ct. 465 (1897), there was a petition to open decree of distribution of balance arising from Orphans' Court sale of real estate by an executor. A certain sum of money had been awarded to a mortgage creditor who had given notice at the sale that the lien of the mortgage would be divested; petition presented by guardian of minor children of the decedent complaining of this award to the mortgage creditor, and setting out that they had no notice of the sale. The court granted the petition and directed payment of the amount due the mortgage creditor to a guardian of the children. The case was reversed on appeal by the administrator. An administrator may appeal from a decree upon an account which is final as to him. Certain other matters are in the sound discretion of the court below, which is not to be interfered with except where there is an abuse of the discretion. The refusal of the district court to direct an executor to apply to the court for another order of sale, his return to the first being that the property could not be sold for a sufficient bid in consequence of an easement, Gamble v. Woods, 53 Pa. 158 (1866). Order opening decree of confirmation and setting aside sale, Williams's Est., 140 Pa. 187 (1891). Decree refusing to set aside sale of real estate on ground of inadequacy of price, Bowers's App., 84 Pa. 311 (1877). Bill of review by an heir asking that the decree directing administrator's sale for payment of debts be rescinded and action of the court on the petition setting the sale aside, Haslage's App., 37 Pa. 440 (1861). The judgment creditor may not appeal from the action of the court below discharging a rule to show cause why the order of sale for payment of debts should not be vacated. If the judgment creditor had a lien, the order of sale was for his benefit, and the appropriate means of settling the estate; if not a lien creditor, he had no interest in the question, and could not be permitted to interfere in the proceeding at all, Everman's App., 67 Pa. 335 (1871). Appeal lies from decree of confirmation of sale, Robinson's App., 62 Pa. 213 (1869).

APPENDIX A.

An Act.

Relating to the Sale and Conveyance of Real Estate.

WHEREAS, The general welfare requires that real estate should be freely inalienable,[1] and be made productive to the living owners thereof:

AND WHEREAS, In matters which the judiciary is competent to hear and decide, it is expedient that the court should adjudicate them after a full hearing of all parties, rather than that they should be determined by special legislative acts upon an exparte hearing:[2]

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That in all cases where real estate shall have been acquired[2a] by descent or last will, the Orphans' Court, and in all other cases the Courts of Common Pleas,[3] of the respective counties of this Commonwealth, shall have jurisdiction to decree[4] the sale;[5] mort-

(1) Obvious misprint. Should be "alienable." The preamble as it stands contradicts flatly the object of the statute.

(2) See § 10, ante.

(2a) See § 24a, ante.

(3) The Act of April 27, 1855, P. L. 368, Sec. 5, provides that "whenever the estate shall have been derived partly by deed and partly by descent or will, either the Court of Common Pleas or the Orphans' Court may entertain jurisdiction of the proceedings to make sale or lease thereof.' The Act of April 21, 1856, P. L. 486, Sec. 1, provides: Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That in all cases where sales of the real estate of lunatics have been made under the Act of the eighteenth of April, one thousand eight hundred and fifty-three, entitled "An act relating to the sale and conveyance of real estate under a decree of the Court of Common Pleas," the same shall be valid and effectual, notwithstanding such real estate may have been derived by descent or will. See § 14, ante.

(4) The Act of April 13, 1854, P. L. 368, Sec. 3, provides: "In all cases wherein any of the courts of this Commonwealth might have authorized any sale or conveyance, or letting on ground-rent or otherwise, and such sale, conveyance or letting may have been made without leave of such court, it shall be lawful for such court, if approving of such sale or

gaging,[6] leasing[7] or conveyance upon ground[8] rent of such real estate in the cases hereinafter described:[9] Provided, That any such court in the county where the premises shall be situated, shall be of opinion that it is for the interest and advantage of those interested therein,[10] that the same should be sold, mortgaged, leased or let on ground rent, and may be done without injury or prejudice to any trust, charity, or purpose for which the same shall be held;[11] And provided, That the same may be done without the violation of any law which may confer an immunity or exemption from sale or alienation.[12]

Section 2.[13] That such sale, mortgaging, leasing or conveyance upon ground rent may be decreed when ever real estate shall be[13a] held for or owned by minors,[14] lunatics,[15] or habitual drunk-

conveyance or letting, to approve, ratify and confirm the same, with the same effect as if such decree had preceded such sale, conveyance or letting." This act, of course, applies to all proceedings and is not confined to those under the Price Act, Donnelly v. Byers, 234 Pa. 339 (1912). See § 21, ante.

(5) See § 41, ante.

(6) See § 45, ante.

(7) See § 48, ante.

(8) See § 50, ante.

(9) See § 13, ante, n. 18.

(10) See § 26, ante.

(11) See § 32, ante.

(12) See § 33, ante.

(13) The Act of June 14, 1897, P. L. 144, Sec. 1, re-enacts and amends this section, adding the phrases underlined and omitting the words in brackets. Confer Act of June 15, 1897, P. L. 159 post.

(13a) See § 24a, ante.

(14) See § 63, ante. See Act March 29, 1832, P. L. 190, Sec. 31; Act June 16, 1836, P. L. 682; Act March 16, 1847, P. L. 474, Sec. 2; Act April 3, 1851, P. L. 305.

Act of May 21, 1901, P. L. 272, provides: Section 1. Be it enacted, etc., That when application shall hereafter be made to the proper Orphans' Court, having jurisdiction of the accounts of any guardian, for leave to sell or mortgage the real estate of a ward, or any part of the same, for the payment of debts or for other purposes, and any part of said real estate is situated partly in each of two or more counties, by reason of a county line running through the same, the court shall have power to order and direct the sale or mortgage of the interest of the ward in the whole or any part of said tract of land, irrespective of the county boundary lines, and such sale when confirmed by the said court shall be as effectual to pass the title of such real estate to the purchaser as if the whole of said tract of land had been within the boundaries of the county having juris-

ards,[16] so duly found by inquisition, for the sole and separate use of married women,[17] for religious, beneficial or charitable societies or associations,[18] incorporated or unincorporated,[18] or

diction of the accounts of the guardian: Provided, That notices of said sale, as now required by law, be given in all the counties in which the land is situated, and that a certified copy of all proceedings in connection with said sale or mortgage, including the return of sale, be recorded in the Orphans' Court of each county in which said land is situated: And provided further, That any mortgage, judgment, bond or other obligation taken by such guardian to secure the purchase money, or any part thereof, by lien on such lands, shall be duly recorded or entered in each of the counties in which said lands lie, as now required by law.

Section 2. The Orphans' Court of the several counties of this Commonwealth, in all cases where under existing laws the court has power to order the sale of real estate for the payment of debts of a ward and for other purposes, may decree and approve a private sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at private than public sale, as where the interest shall be undivided or for any other sufficient cause.

(15) See § 76, ante. By Act of April 11, 1866, P. L. 780, the husband or wife of a person non compos mentis may sell, mortgage, lease, or convey on ground rent, real estate under direction of Court of Common Pleas of proper county.

(16) See § 76, ante.

(17) See § 80, ante.

(18) See § 85, 86, ante. The Act of March 24, 1877, P. L. 39, Sec. 1, provides: "Section 1. Be it enacted, That wherever the several courts of this Commonwealth are authorized by existing laws to decree the sale and conveyance of real estate, and it appears to the court of the proper county, on application, that such real estate is held by trustees of religious societies, congregations or church organizations which are desirous of selling and conveying a portion of said real estate to an association or corporation, for the exclusive purpose of a cemetery or a place of sepulchre for the dead, it shall be lawful for said court to order and decree a private sale of said real estate, at such price and upon such terms and conditions as shall be agreed upon by said parties, notice of said application to be given to all parties interested as the court shall direct; the sale to be approved by the court and the deed acknowledged as required by existing laws."

The Act of May 23, 1887, P. L. 168, privides: "Section 1. Be it enacted, etc., That the trustees, treasurer or other proper officers of any church, congregation, presbytery or other church organization, owning real estate used as a burying ground, may, whenever so desired by a majority vote of such church, congregation or church organization, owner or owners as aforesaid, apply by petition to the Court of Common Pleas of the county, wherein such real estate may be located, for leave to abandon such burying grounds, remove and re-inter the bodies of deceased persons therein buried, and to sell such real estate in fee, clear of all restriction.

for or by any other corporation,[19] or by trustees for any public or private use or trust,[20] and although there may exist a power of sale,[21] but the time may not have arrived for its exercise,[22] or any preliminary act may not have been done to bring it into exercise,[23] or the time limited for its exercise may have expired,[24] or any one or more persons required to consent or to join in its execution may have become non compos mentis,[25] or have removed out of the State,[26] or died,[27] or should refuse to act or unreasonably withhold consent;[28] also when there has been or shall be a defective appointment in any deed, or last will and testament, and the necessary power is not given to the executor, devisee or appointee to make sale and conveyance of real estate.[29] Also whenever the owner of real estate may have been absent and unheard from for seven years, under those circum-

Upon presentation of such petition, the court shall make such order relating to publication and notice to parties in interest as may seem meet and proper, and, after final hearing of all parties in interest, may make such decree relating to the abandonment of such grounds for burial purposes, the removal of bodies therefrom and the sale thereof, as may be just and equitable; and, when no person in interest can be found, said bodies to be removed and separately re-interred in some suitable burying ground, and each grave to be properly marked by head stone, et cetera, (provided such grave was so marked before removal,) by the trustees, treasurer or other proper officer or officers of the church, congregation, presbytery or other church organization, owning the real estate so used as a burying ground: Provided, That no such petition shall be granted except upon condition set forth in the decree, requiring the petitioners to purchase the rights of all lot holders in such burying grounds and to secure the consent in writing of the near relatives of decedents, whenever such relatives shall appear as parties to such proceedings: And provided further, That any party in interest may appeal from the decree of such court within thirty days."

(19) See § 82, ante.
(20) See § 134, ante.
(21) See § 147, ante.
(22) See § 148, ante.
(23) See § 147, ante.
(24) See § 147, ante.
(25) See § 147, ante.
(26) See § 147, ante.
(27) See § 147, ante.
(28) See § 149, ante.
(29) See § 150, ante.

stances from which the law would presume his or her death.[30] Whenever a husband shall own real estate having a wife who is a lunatic,[31] or a minor;[32] whenever a married woman owns real estate and her husband has abandoned her for two years,[33] or been absent and unheard from for seven years.[34] Whenever a decedent shall have contracted by parol to sell real estate,[35] and those interested do not think it expedient to plead the statute requiring contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold. Whenever a decedent's real estate is subject to the lien of debts not of record.[36] Whenever real estate shall be entailed,[37] or contingent remainders,[38] or executory devisees,[39] *or vested remainders which are liable to open and let in after-born children shall be limited thereon.*[40] Or whenever in proceedings in partition in equity it shall appear that real estate cannot be divided without prejudice to the interests of the owners.[41] And also whenever real estate shall have been purchased[42] or any ground rent been reserved[43] and be held by any person acting in a trust or fiduciary capacity. And such decree may be made, whether such ownership or inter-

(30) See § 169, ante. Confer Act May 28, 1913, P. L. 369, relating to estates of persons supposed to be deceased.

(31) See § 81, ante.

(32) This clause practically obsolete since the Act of March 22, 1865, P. L. 30, which provides: "That the deed of conveyance, executed and acknowledged by a wife, in conjunction with her husband, of his real estate, shall be valid and effectual, notwithstanding the minority of the wife at the time of such execution and acknowledgment, and any such deed, heretofore made, shall be as valid as if the wife had, at the time, been of lawful age."

(33) See § 80, ante.

(34) See § 80, ante.

(35) See § 151, ante.

(36) See § 113, ante.

(37) See § 90, ante.

(38) See § 97, ante.

(39) See § 112, ante.

(40) Clause in italics added by re-enactment of June 14, 1897, P. L. 144, Sec. 2. By Act of June 15, 1897, P. L. 159, "Lands . . . devised or granted for life or for the life of another, and with remainder limited to a class of persons some or all of whom may or may not be in being at the time of the decree." See § 103, ante.

(41) See § 156, ante.

(42) See § 56, ante.

(43) See § 50, ante.

est shall be held or enjoyed in severalty, joint-tenancy, coparcenary or in common with others,[44] and generally in all cases where estates have been or shall be devised or granted in trust or for special or limited purposes,[45] or where any party interested therein is under a legal disability to sell and convey the same;[46] Provided, That nothing in this act contained shall be taken to repeal or impair the authority of any act of Assembly, general or private, authorizing the sale of real estate by decree of court or otherwise,[47] *nor* to affect or impair any right or powers otherwise existing in any person or corporation[48] to sell, mortgage, lease, or let on ground rent, any real estate, (and every power to sell in fee simple real estate)[49] created by deed or will, shall be taken to confer an authority to sell and convey,[50] reserving a ground-rent or rents in fee, and the same to release and extinguish according to law and the stipulation of the deed,[51] and also to grant and convey such ground-rent or rents to any purchaser or purchasers thereof, free of all trusts.[52]

SECTION 3. That such sale, mortgaging, leasing or conveyance upon ground rents, may be decreed on the petition[53] of any trustee, guardian, committee or person interested, clearly setting forth the facts needful for the information of the court under oath or affirmation, and if all proper parties shall not have voluntarily appeared as petitioners or respondents, the court shall fix a day[55] for parties to appear, and cause a citation to be served on all persons in being who shall not have appeared, and who shall have any present or expectant interest in the premises, warning them to appear, and that they shall be heard on the day *designed*,[56] and for those who cannot otherwise be served, cause advertisement to be made in manner most likely to afford notice,

(44) See § 22, ante.
(45) See § 129, ante.
(46) See § 62, ante.
(47) See § 20, ante.
(48) See § 83, ante.
(49) Clause in brackets omitted from the re-enactment of June 14, 1897, P. L. 144, Sec. 2. Cfr. Sener v. Ephrata Borough, 176 Pa. 80 (1896).
(50) See § 51, ante.
(51) See § 51, ante.
(52) See § 51, ante.
(53) See § 59, ante.
(55) See § 18, ante.
(56) Misprint for designated.

and service made in any part of the United States and the territories thereof, with oath or affirmation of the fact, taken before any judge or justice of the peace, and filed of record shall be good service, and guardians shall be served and appear for their wards, and if minors shall have no guardian, the court shall appoint a guardian for them;[57] committees shall be served and appear for lunatics and habitual drunkards,[58] and husbands shall be served and appear with their wives, except husbands who shall have abandoned their wives for two years, or been absent and unheard from for seven years,[59] and if parties make default in appearing, the court after investigation of the facts may proceed to make a decree in the premises; Provided, That in case of the appointment of a guardian by the court, and the payment over of money to him, or of the payment of money to any former guardian, the court shall take adequate security[60] for the faithful application of such money, and before the payment of any money to any guardian not within the court's jurisdiction, the court shall be duly notified that adequate security has been given to the court having jurisdiction over him, whether within or without this Commonwealth.[61]

SECTION 4. That such sales, mortgages, leasing and letting on ground rent, shall only take place after full and careful investigation by the court, aided when deemed necessary, by the report of a competent person, to be appointed by the court,[62] and shall be made by trustees, executors, administrators, guardians, committees, or owners having a present vested interest, as the court may order,[63] and be under the direction and subject to the approval of the court before which the deed shall be acknowledged,[64] and be certified under seal to have been acknowl-

(57) See § 65, ante.
(58) See § 78, ante.
(59) See § 19, ante.
(60) See § 179, ante.
(61) See § 184, ante.
(62) See § 26, ante.
(63) See § 60, ante.
(64) See § 236, ante. Act of April 13, 1854, P. L. 368, Sec. 1, provides: "Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That in all cases of sales, mortgages, leasing, and letting on ground rent, of any real estate authorized under the act to which this is a supplement, where the trustes, executors,

edged, and all absolute sales in fee simple (except as hereinafter provided) shall be by public sale or vendue, and may be either

administrators, guardians, committees, or other persons authorized to make such sale, mortgage or lease, shall reside out of the county where such real estate is situate, the deed, mortgage, or lease thereof, may be acknowledged before the Court of Common Pleas or Orphans' Court of any county of this state, where the person or persons executing the same may reside, and certified under the seal of such court to have been so acknowledged; and such certificate of acknowledgment shall be read in open court of the county where the real estate is situate, and entered upon the records thereof; and upon being so entered, shall have the same effect as if the deed, mortgage or lease had been acknowledged before said court, as now required by law." By Act of April 1, 1863, P. L. 187, persons executing deed a mortgage or lease who reside out of the State may acknowledge as provided by the Act of Dec. 14, 1854, P. L. 724.

The Act of March 23, 1867, P. L. 43, Sec. 1, provides, "Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That all deeds made to convey real estate, sold under an act passed the eighteenth day of April, eighteen hundred and fifty-three, entitled 'An Act relating to the sale and conveyance of real estate,' being acknowledged in court, and so certified to have been, by the clerk, or prothonotary, as required by said act, or supplements, may be recorded in the recorder of deeds office, without other acknowledgment."

The Act of April 17, 1866, P. L. 108, providing as follows: "Section 1. That in all cases where sales, mortgages, or leasings, of any real estate, have heretofore been, or shall hereafter be, made, under the provisions of an act of assembly, entitled 'An Act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, one thousand eight hundred and fifty-three, and the deeds, mortgages, or leases, made in pursuance of such sales, mortgagings, or leasing, have been acknowledged before a justice of the peace, or other officer, having authority, under the laws of this Commonwealth, to take the acknowledgment of deeds, and other instruments of writing therein, such deeds, mortgages and leases, shall be as valid and effectual, to all intents and purposes, as if the same had been acknowledged before the court, and in the manner specified in said act." (For a case of a defective acknowledgment cured by this act, see Smyth v. Neill, 1 W. N. C. 43 (1874), was amended by the Act of April 22, 1903, P. L. 241, to read as follows: "Section 1. That in all cases where sales, mortgagings or leasings of any real estate have heretofore been, or shall hereafter be, made, under the provisions of an act of assembly, entitled 'An Act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, one thousand eight hundred and fifty-three, and the deeds, mortgages or leases, made in pursuance of such sales, mortgagings or leasings, have been or shall hereafter be acknowledged before a justice of the peace, notary public, or other officer having authority under the laws of this Commonwealth to take

entirely for cash, or partly on credit and partly for cash,[66] after full advertisement for at least twenty days, by hand-bills posted in at least twenty of the most public places in the city or county where the premises shall be situated, and in at least two newspapers, not less than three times in each: Provided, That if the court shall be of opinion that under the circumstances a better price can be obtained at private than at public sale, as where the interest be undivided, or for other sufficient cause, the court may

the acknowledgments of deeds and other instruments of writing therein, such deeds, mortgages and leases shall be as valid and effectual, to all intents and purposes, as if the same had been or shall hereafter be acknowledged before the court, and in the manner specified in said act."

The Act of April 23, 1909, P. L. 156, provides: "That hereafter it shall and may be lawful for county treasurers, county commissioners, executors, administrators, trustees, or other persons acting in any official or representative capacity, where now required or authorized by law to acknowledge deeds or other instruments before a justice of the peace, to acknowledge the same before a notary public or any other officer authorized by law to take acknowledgments of deeds; and any acknowledgments of deeds or other instruments, heretofore made as authorized hereby, are validated and made good and effectual: Provided, That this act shall not apply to any case heretofore adjudicated, or in which proceedings at law or in equity are now pending."

(66) The Act of March 22, 1859, P. L. 207, provides: "Section 1. That in all sales of real estate under the order of the Orphans' Court authorized by the laws of this Commonwealth, the court decreeing the sale shall have power to direct the terms thereof for cash, not less than one-fourth of the purchase money at the time of the confirmation of the sale, and the balance in such instalments, and at such times as, in the opinion of the court, shall be for the interest and advantage of those interested therein, requiring security to be approved by the court in at least double the value of the interest proposed to be sold, before such sale shall be ordered or made: Provided, That the purchase money shall be a lien on the premises sold until fully paid, according to the decree of the court.

"Section 2. That all sales of real estate heretofore ordered by the Orphans' Court as aforesaid, wherein a longer time than one year shall have been directed for the final payment of the purchase money, shall be taken and deemed to have the same force and effect, and be as valid and binding as if the purchase money therein had been ordered and directed to have been paid within one year from the time of any such sale or sales: Provided, That this act shall not apply to the City of Philadelphia. See § 44, ante.

approve and decree a private sale,[68] and such mortgaging, leasing and letting on ground rent, shall be upon terms and at rates

(68) See § 41, ante. The following acts probably do not effect the Price Act, particularly since the amendment of 1913. The Act of May 9, 1889, P. L. 182, provides: "Section 1. Be it enacted, etc., That from and after the passage of this act, the Orphans' Court of the several counties of this Commonwealth, in all cases where, under existing laws, the court has power to order the sale of real estate for the payment of the debts of decedents and for other purposes, may decree and approve a private sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interests shall be undivided, or for any other sufficient cause.

"Sestion 2. All acts or parts of acts inconsistent with the provisions of this act, be and the same are hereby repealed. The Act of June 9, 1911, P. L. 724, as amended by the Act of June 12, 1913, P. L. 470, provides, 'Whereas, the act of the General Assembly of Pennsylvania, approved the 9th day of May, 1889, P. L. 182, entitled "An Act relating to Orphans' Court Sales," authorizing the Orphans' Court to decree and approve private sales of real estate for the payment of the debts of a decedent, and for other purposes, makes no provision for the notice to be given of such sales; and, Whereas, Questions have arisen with regard to the sufficiency of the notice to creditors and others interested in such real estate, as to the title of such real estate sold, when so sold; now, therefore,

"Section 1. Be it enacted, etc., That before authorizing, decreeing or approving a private sale of real estate, for the payment of the debts of the decedent, public notice thereof shall be given by advertisement printed in at least one newspaper, and in the legal periodical, if any, designated by the rules of court of the proper county, for the publication of legal notices, published in the county where such real estate is located, for at least twenty days prior to the date fixed by such order for authorizing, decreeing or approving such sale; and also by written or printed notices, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of such notices shall be posted at three of the most public places in the vicinity of such real estate.

"'Section 2. Before authorizing, decreeing or approving such sale the court shall require proof, by affidavit, to be filed in the proceeding, that the notice required by the first section hereof has been given.

"'Section 3. On the day fixed by such order and notice for authorizing, decreeing or approving such private sale, any creditor of such decedent, or party interested as heir, devisee or intending purchaser, may appear and object to such private sale on account of the price, and offer to give or pay a substantial increase therefor; and the court, at its discretion, may thereupon decree or approve such sale, or refuse to decree or approve the same, and accept any substantially increased offer, and approve or decree such real estate to such new bidder, upon compliance with the

to be approved by the court,[69] and the specific execution of the contracts of decedents upon the terms and at the price proved or admitted to have been agreed upon by the parties,[69a] but no such private sale, leasing or letting on ground rent, shall be upon terms or at rates less favorable than others, who, of competent ability to contract and uniting in the sale of undivided interests, shall accept;[70] and it shall be the duty of the court in decreeing sales, leases and conveyances upon ground rent of real estate, to order the premises, if necessary, to be so subdivided[71] as to command the highest price or greatest rents, and for such purposes, where the premises may admit of or require it, shall have power to lay out roads, streets and alleys, and to vacate such as shall not have been paid for, or received into actual use by the public, if found to be inconvenient, and to make an unprofitable division of the property:[72] And provided further, That no sale or sales shall

conditions of sale and giving security in accordance with the order of the court.

"'Section 4. All private sales of real estate of decedents heretofore made under and by virtue of decrees of Orphans' Court, under and in pursuance of the said Act of May ninth, one thousand eight hundred and eighty-nine, shall and the same are hereby declared to be valid and effectual to vest in the purchasers thereof the title of such decedents in the real estate so decreed to be sold: Provided, That adequate security, conditioned for the faithful application of the purchase money, shall have been given by such executors or administrators, as the case may be, in accordance with such decree.'"

The Act of July 21, 1913, P. L. 871, validating sales under the Act of 1899, in certain cases provides as follows: "Sec. 1. Be it enacted, etc., That all private sales of real estate of decedents, heretofore made by virtue of decree of the Orphans' Court, in pursuance of the act approved the ninth day of May, 1889, entitled, 'An Act relating to Orphans' Court sales,' which were not advertised in accordance with the provisions of said act as amended, are hereby declared to be valid and effectual to vest in the purchasers thereof the title of such decedents in the real estate so owned: Provided, That adequate security, conditioned for the faithful application of the purchase money, shall have been given by such executors or administrators, as the case may be, in accordance with such decree: Provided, however, That this act shall not affect any litigation now pending in any court of this Commonwealth, under the act as amended."

(69) See note 66 ante.

(69a) See § 151, ante.

(70) See § 22, ante.

(71) See § 58, ante.

(72) See § 58, ante.

be ordered or made under the provisions of this act, in any case, until security,[73] to be approved by the Court of Common Pleas, or Orphans' Court, be given in at least double[74] the value of the interest proposed to be sold.[75]

SECTION 5. That the title of purchasers[76] under all such sales, mortgages, or conveyances upon ground rent, shall be a fee simple title, indefeasible by any party or persons, having a present or expectant interest in the premises,[76] and be unprejudiced by any error in the proceedings of the court,[76] and by every such public sale the premises sold shall be discharged from all liens,[77] and every such sale, and every conveyance in fee simple upon ground rent, shall have all the effect of any other proceeding or conveyance now authorized by law and strictly conducted to a final conclusion, to bar any estate tail,[78] and to defeat contingent remainders,[79] and in such case shall vest in the tenant in tail, or particular tenant, whether minor, feme covert, or otherwise, who after such proceeding or conveyance might have become entitled to the absolute fee simple title, the absolute right to the purchase money,[80] and the ground rents reserved; and such sales and conveyances on ground rent shall also bar any right of the Com-

(73) See § 183, ante.

(74) See § 179, ante.

(75) The Act of Feb. 24, 1834, P. L. 70, Sec. 43, provides that no executor or administrator shall have power to execute any order or decree of the Orphans' Court for the sale of any real estate or to receive the proceeds of a sale made by authority of law without giving security to be approved of by the Orphans' Court having jurisdiction of his accounts. The Act of March 23, 1867, P. L. 43, Sec 1, provides, inter alia, that the security required by said act, may be approved by the proper court, of like jurisdiction, of the county in which the grantor, or one of them, is resident, and be certified, under seal of such court, to that wherein the sale was decreed; and such certificate shall be copied on the records thereof.

(76) See § 197, ante.

(77) The Act of March 23, 1867, P. L. 43, Sec. 2, provides as follows: "That private sales, made by order of court, under the said Act of the eighteenth of April, one thousand eight hundred and fifty-three, shall discharge the premises sold from the lien of the debts of the decedent, except debts of record, and debts secured by mortgage: Provided, That the security, required by said act, shall have been duly entered." See § 259, 260, ante.

(78) See § 90, ante.

(79) See § 97, ante.

(80) See § 108, ante.

monwealth to forfeit real estate that may have been held by or for any corporation beyond what has been authorized, if no proceeding to procure a forfeiture shall have been commenced[81] before petition filed for a sale or letting on ground rent: Provided, That the petition shall set forth an explanation of the title, and of the purpose to bar the entail defeat the contingent remainder[82] or the right of the Commonwealth to have inquisition for any estate defeasible as aforesaid:[83] And provided, That the purchase money or rent reserved shall be a lien on the premises sold or let, until fully paid according to the decree of the court.[84]

SECTION 6. That the purchase money, or mortgage money, ground or other rent reserved, shall in all respects be substituted for the real estate sold, mortgaged, or let,[85] as regards the enjoyment and ownership thereof, after the payment of liens, and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest, present or future, vested, contingent, or executory, as the real estate sold, mortgaged or let, had been held,[86] except only such remainders, after an entailment[87] or contingent remainders,[88] as shall have been barred or defeated as aforesaid, and those entitled to a present interest in such real estate, shall receive the interest of the proceeds or rents thereof,[89] unless expressly directed to accumulate:[90] Provided, That no principal moneys raised by sale or mortgage,[91] as aforesaid, shall be expended for any other purpose than for the payment of liens upon or the improvement of the same real estate when mortgaged, or other real estate when held for the same uses and persons, unless the same be required for the maintenance or education of parties having the like interests vested or ex-

(81) See § 84, ante.
(82) See § 108, ante.
(83) See § 84, ante.
(84) See § 44, ante.
(85) See § 187, ante.
(86) See § 187, ante.
(87) See § 93, ante.
(88) See § 108, ante.
(89) See § 108, ante.
(90) This clause must be read in subservience to Sec. 9 relating to accumulations, for a discussion of which see Foulke, Rule Against Perpetuities, etc., in Penna., (1909) Chap. 25.
(91) See § 47, ante.

pectant, and can be equally and equitably so applied, and without diminution of the capital that may of right become the property of parties having unbarred interests or title in remainder,[92] or by executory devise,[93] and it shall be the duty of the court to decree the proper application of all purchase or mortgage moneys and rents, with the aid of an auditor, when deemed necessary to the discharge of liens and to parties interested, as and when they may be entitled, and before any decree shall be executed,[95] the person or persons entrusted to execute the same, shall give adequate[96] security to the Commonwealth, to be approved by the court,[97] conditioned for the faithful execution of the trust and proper application of all moneys to be received, according to the trust and decree of the court, which security shall enure to the benefit of all parties interested, and such security being so given, no purchaser[98] or lessee[99] shall be bound to see to the application of the purchase money or rents, or be in any manner liable to or affected by the former trusts or limitations upon the premises.

SECTION 7. That it shall be lawful for trustees, guardians, committees, married women, and corporations, in all the cases aforesaid, under the decree of the court as aforesaid, and with the like effect and indemnity to them in acting thereunder, to make and take conveyances by deed, acknowledged in court, without public sale, in order to square and adjust lines between adjoining owners,[100] to make and take conveyances, to perfect the partition of real estate[101] held in join tenantcy, coparcenary,

(92) See § 108, ante.

(93) See § 112, ante.

(95) See § 182, ante.

(96) See § 179, ante.

(97) See § 177, ante.

(98) See § 183, ante.

(99) Mortgagee is omitted, probably a printer's error, as there is just as much reason for protecting the mortgagee as for protecting the purchaser or lessee. Purchaser may perhaps be taken to include a grantee of a conveyance on ground rent.

(100) See § 55, ante.

(101) See § 157, ante. The Act of May 23, 1913, P. L. 345, provides: "Section 1. Be it enacted, etc., That when real estate in this Commonwealth is held in common, and one or more of the co-tenants is or are minors, and all of the parties who are sui juris, together with the guardians of the estates of minors interested, desire to make amicable partition of said land and have agreed to a proper division of the same, it

or in common with others, to purchase[102] other real estate, when needful,[103] to that already owned by any such party, or useful to the business thereupon carried on, or when necessary, to protect any security or rent held on property exposed to judicial sale:[104] Provided, That no corporation shall be so authorized to purchase beyond its charter license:[105] And provided, That no purchase or sale by authority of this act, shall change the course of descent or transmission of any property changed in its nature by virtue thereof,[106] as respects persons who are not of competent ability to dispose of it,[107] and all persons entrusted with moneys raised under this act shall be authorized to file their accounts[108] in the court whence their authority was derived, and upon such notice as the court may order to parties interested, or after being audited, if deemed necessary, or by consent of all parties interested, such accounts may be finally confirmed, and upon payment of the balance, as may be decreed by the court, such accountants[109] may be fully discharged from the trust.[110]

shall be lawful for the Orphans' Court of the proper county, upon the petition of any guardian of the estate of any minor or minors interested, to authorize and empower the petitioner to join with the co-tenants of said minors in a proper deed or conveyance to effect such amicable partition. Provided, That the court shall be of opinion that it is for the interest and advantage of the estate of said minor that such partition should be made.

(102) See § 56, ante.

(103) The word adjoining should be supplied here to make sense.

(104) See § 56, ante. This clause seems to be declaratory of the existing law.

(105) See § 56, ante.

(106) See § 189, ante.

(107) See § 190, 191, ante.

(108) See § 188, ante.

(199) See § 188, ante.

(110) The Act of April 18, 1864, P. L. 462, Sec. 1, provides, "That it shall be lawful for trustees, guardians, committees, married women, and corporations, in addition to the powers conferred by the seventh section of the act to which this is a supplement, under the decree of the proper court, and with the like effect and indemnity to them in acting thereunder, to make and take, or to join with owners of other undivided interests in making and taking conveyances, by deed acknowledged in court, and without public sale, in order to change, in part, or in whole, the route, or location, of any right of way, or passage, existing over, and upon, adjoining, or other lands: Provided, The court shall be of opinion, that is for the interest and advantage, of the owner, or owners,

SECTION 8. That in all cases and proceedings under this act, appeals[111] may be taken to the Supreme Court from the Orphans' Court as now provided by law in other cases, and in the Court of Common Pleas, as provided in equity cases, in the respective counties of the State: Provided, That if any decree be carried into execution before the appeal be perfected,[111] and written notice thereof given to any vendee, mortgagee, or lessee, any reversal thereof shall not affect the right or title of such vendee, mortgagee, or lessee, but the purchaser or mortgage money, or rents shall stand in lieu of the premises sold or mortgaged, or leased, so far as thus encumbered: Provided further, That before any decree be carried into effect to afford such indemnity, twenty days be allowed from its entry[111] to take and perfect such appeal.[112]

SECTION 10. That the directions given in the sixth section of this act in regard to the security[113] to be given in cases of sales, mortgage, or letting of real estate, and the condition of the bond or security therein prescribed, shall apply to all cases of sales or mortgage of real estate by order of the courts of this Commonwealth: And provided, That no decree for the sale, mortgaging or letting of any real estate under the provisions of this act, shall be made except when the president of the court, or the law judge or judges thereof, shall be present,[114] and that the acts in relation to special courts, where the president judge shall be interested, related to parties in interest, or otherwise incapable of acting, shall apply to all such provisions.

of the land, to which such right of way is appurtenant, that such change of route, or location, be made: And provided further, That it shall be in the discretion of the court, in such cases, to require security, or not, from the person or persons, aforesaid, making or taking, such conveyances."

(111) See § 271, ante.

(112) Section 9, relating to Accumulations, is omitted from the discussion in this book. See Foulke, Rule Against Perpetuities, etc., in Penna. (1909), Chap. 25, p. 371, for discussion of it.

(113) See § 177, ante.

(114) The law judge is presumed to be present, and his presence need not be affirmatively shown on the record, Morrison v. Nellis, 115 Pa. 41 (1887), Trunkey, J., at 46; s. c. 19 W. N. C. 20, 44 L. I. 187, 34 Pitts. L. J. 274, 14 Lanc. L. R. 96.

Sale of Estates Amounting to Less than a Thousand Dollars.

SECTION 1. That from and after the passage of this act, whenever any person shall die siezed of real estate valued at not more than one thousand dollars, and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the Orphans' Court of the proper county, in its discretion, upon the joint petition of the widow and heirs, and the guardians or committees of such as are minors or under disabilities, in whom the real estate of the decedent shall have vested, setting forth the description of the property, the desire to have the same sold and its estimated value duly sworn to, together with the affidavit of two disinterested persons, stating that the real estate is not worth more than one thousand dollars, to order the executor, administrator or trustee to make sale and proceed in all respects in the manner now provided by existing laws in cases of the sale of real estate for the payment of debts of a decedent, and the proceeds of such sale, after the payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate.[116]

Lease of Mining Lands.

That whenever, under the provisions of the aforesaid Act of eighteenth of April, one thousand eight hundred and fifty-three, and the several supplements thereto, the courts of this Commonwealth or any of them, have power to decree a lease of lands for mining purposes, it shall be further lawful for the said courts to order and decree that such lands may be so combined and consolidated with other adjoining lands, as to form one tract in which the several persons or parties so combining and consolidating shall become seized of undivided interests, proportionate to their several divided interests before such combination and consolidation, and that the rents or royalties to be received under such lease shall be in the like proportions.[117]

Sale for Distribution on Petition of Widow and Heirs.

The Act of June 12, 1893, P. L. 461,[118] § 1, provides: Section 1. Be it enacted, etc., That whenever any person shall die seized of real estate and the parties in interest desire the same

(116) Act of May 14, 1874, P. L. 166.
(117) Act of June 8, 1874, P. L. 277, Sec. 1.
(118) As amended by the Act of May 23, 1913, P. L. 304.

to be converted into money for distribution it shall be lawful for the Orphans' Court of the proper county, in its discretion, upon the joint petition of the widow and heirs and the guardians or committees of such as are minors or under disabilities, in whom the real estate of the decedent shall have vested by descent or will, and legatees whose legacies are charged on said real estate or the representatives of such legatees as may be deceased setting forth the description of the property, the desire to have the same sold, to order the executor, administrator or a trustee to make sale after he shall have given bond with one or more sureties in double the appraised value of the real estate, to be approved by the court, and proceed thereafter in all respects in the manner now provided by existing laws in cases of the sale of real estate under proceedings in partition, and the proceeds of such sale after the payment of the expenses thereof shall be distributed to and among those entitled thereto, the same as real estate. Provided, That such sale shall have the same effect in all respects as a public sale in proceedings in partition of real estate under existing laws.

Act of 1897 Providing for Remainders to a Class.

The Act of June 15, 1897, P. L. 159, provides as follows: The several Orphans' Courts of this Commonwealth shall have jurisdiction to decree the public or private sale, mortgaging, leasing or conveyance upon ground rent, of lands within their respective counties which have been or shall be devised or granted for life, or for the life of another, and with remainder limited to a class or persons, some or all of whom may not be in being at the time of the decree for such public or private sale, mortgaging, leasing or conveyance upon ground rent: Provided, That the court to which such application may be made shall be of the opinion that it is for the interest and advantage of those interested, or who may become interested therein, that such lands should be sold, mortgaged, leased or conveyed upon ground rent, and that the same may be done without injury or prejudice to any trust, charity or purpose for which such lands may be held, and that the same may be done without violating any law which may confer an immunity or exemption from sale or alienation.

Sec. 2. That the proceedings for such public or private sale, mortgaging, leasing or conveyance upon ground rent shall be in all

respects the same as are now provided by existing laws in cases where contingent remainders or executory devises are limited, and a decree of the court is sought for the sale, mortgaging, leasing or conveyance upon ground rent of the land. And the decree of court made under this act shall have the same effect as to title, discharge of liens, and in all other respects as in the instances last above enumerated. And the purchase money, mortgage money, ground or other rent reserve shall in all respects be substituted for the land sold, mortgaged or let, as regards the enjoyment and ownership thereof after payment of liens, and shall be held for or applied to the use and benefit of the same persons and for the same estates and interests, present or future, vested, contingent or executory as the lands so sold, mortgaged or let had been held. And the court shall make such order or orders as to the distribution or investment of such funds as may be requisite to protect the interests of all persons who are or may become entitled thereto, or to any part thereof, whether such persons, or any of them, are in being at the time of such order and have vested interests therein, or may come into being before the remainder is actually vested in possession upon the determination of the particular estate and become entitled to have the remainder open and let them in.

All sales, mortgages, or lettings, or conveyances upon ground rent, heretofore made under decrees of the Orphans' Court, or Court of Common Pleas of this Commonwealth in cases within the scope and operation of this act, and which have been fully consummated in good faith, are hereby validated.

Sale of Property of Weak-Minded Persons.

The Act of May 28, 1907,[1] provides as follows: Sec. 6. The guardian so appointed shall have precisely the same powers, and be subject to the same duties, as a committee on lunacy in the State of Pennsylvania. The court appointing such guardian shall have full power over the same, in directing an allowance for the said ward, and for the support and maintenance of his wife or his or her children, and the education of his or her minor children, and shall enter a decree of sale, mortgaging, leasing or convey-

(1) P. L. 292, amending the Act of June 19, 1901, P. L. 574, Sec. 2, which amended the Act of April 28, 1899, P. L. 112, which amended Sec. 6 of the Act of June 25, 1895, P. L. 300.

ance upon ground rent, of the real estate or any part thereof of the said ward, whenever, in the opinion of the court, it is necessary for the support and maintenance of the said ward or his family, or the education of his or her minor children, or the payment of his or her debts, or where it is for the interest and advantage of the said ward that the same shall be sold, mortgaged, leased or let on ground rent; and all absolute sales in fee simple, except as hereinafter provided, shall be by public sale or vendue, and may be either entirely for cash, or partly on credit and after full advertisement, for at least twenty days, by handbills posted in at least twenty of the most public places in the city or county where the premises shall be situated, and in at least two newspapers, not less than three times in each: Provided, That if the court shall be of the opinion that, under the circumstances, a better price can be obtained by private sale than at public sale, the court may decree and approve the same. Such sale, mortgaging, leasing and letting on ground rent shall be upon terms and rates to be approved by the court. When the said real estate is situated in the same county in which the said person shall reside, or in another county or counties, and the court shall be satisfied of the propriety of a sale, mortgage or leasing, or letting upon ground rent, upon such real estate or any part thereof not within their jurisdiction, it shall be lawful for such court to make an order or decree authorizing such guardian to sell, mortgage, lease or let upon ground rent, all the real estate of the ward, or so much thereof as the court may think necessary and as it may designate. Thereupon it shall be the duty of the Court of Common Pleas of the county wherein the real estate so designated is situated, upon the petition of such guardian, to make an order for the sale, mortgaging, leasing or letting upon ground rent, of said real estate, or so much thereof as the court, appointing said guardian by its order, shall designate; and such guardian shall in all cases make a return of his proceedings to the said court in the county in which the real estate was sold, mortgaged, leased, or let upon ground rent, shall be found only. If the same be approved by the court, it shall be confirmed, and such guardian shall make a return of said proceedings to the court by which said guardian was appointed. The said guardian shall give such bonds, and file such accounts, at such periods as the court shall determine.

APPENDIX B.

FORMS.

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Preliminary.

Before proceeding to the consideration of specific forms, we shall introduce a few perliminary observations and refer to some of the cases as to questions of the forms of the petition and the decree.

Title.

It is of great importance that the petition should set out the title to the land and how it is derived, who are the parties interested, and how their interests arise. This requirement is frequently

overlooked, and averment is inserted merely that the petitioner is interested in the land or that so and so are the parties interested.[1]

The petition should, when the title is derived under a will, have a copy of the will added. In the absence of a copy, the court probably will not grant the prayer of the petition.[2]

Where the title is derived under a deed, it is the practice to add only a copy of the material portions and omit the usual formal clauses.

Description of the Premises.

The petition should always contain a description of the property as to which the jurisdiction of the court is invoked. This description should always be set out in a separate paragraph and follow the usual form appropriate in such cases. The description need not be repeated in the decree. It is sufficient if the decree merely refers to the premises described in the foregoing petition, or if desired, the premises can be referred to by street number or by location on the street as a precaution to connect the decree and petition. Where there is no description in the petition, it seems that the defect is cured by the filing of a paper containing the description, and by which paper all parties join in the prayer of the petition.[3]

This, however, is a very careless method of proceeding and should not be encouraged.

Jurisdictional Averments.

The act expressly provides that the court shall make the decree if of opinion that it will be "for the interest and advantage of those interested and that it may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation." The petition should follow exactly the wording of the statute, and aver that it is for the interest and advantage, etc. The importance of this is that it clearly fixes the case as being disposed of under the pro-

(1) As to the necessity of setting out title, see Goldsmith's Est., 13 Phila. 389 (1890), s. c. 37 L. I. 465; Johnson's App., 114 Pa. 132 (1886), s. c. 18 W. N. C. 205, 43 L. I. 426, 3 Lanc. Law Rev. 376.

(2) Heffner's App., 119 Pa. 462 (1888), s. c. 21 W. N. C. 249.

(3) Heffner's App., 119 Pa. 462 (1888), s. c. 21 W. N. C. 249; West v. Cochran, 104 Pa. 482 (1884), sub nom. West v. Cochran, 41 L. I. 330, s. c. 31 Pitts. L. J. 373.

visions of the Price Act, thus excluding any possibility of the court referring the case to any other act. Since the act expressly provides that these facts shall appear before the decree is made, it really seems necessary to the validity of the proceedings that these averments should appear in the petition.

In Brock v. Steel Co.,[4] where a bill in equity was filed in the common pleas for specific performance of an orphans' court sale under the Price Act, which had been duly confirmed, the Supreme Court held that the purchaser could not object because these jurisdictional averments were omitted from the petition, that if it sufficiently appeared from the facts of the case that the case would come within these averments, it was not necessary to set them out exactly in the words of the statute. It must be remembered, however that this case arose after the sale had been confirmed. Of course, if the purchaser objects to the confirmation because of the fact that these averments are not in the petition, there seems to be no escape from the conclusion that exceptions should be sustained until the proceedings have been accordingly amended. It is undoubtedly better practice to insert them in the petition. They should also be inserted in the decree. They are of such importance that there should be no doubt in the matter.

Reasons for the Sale, etc.

The reasons for the sale should be clearly set out by giving specifically facts concerning the property, or the title as that it is dilapidated, the revenue falling off, subject to encumbrances which are overdue, or something of that kind which will be a fact why the sale will be to the interest and advantage of those interested. The averment of these reasons is of the utmost importance, and in many cases petitions omit any averment of these facts.[5]

Where the petition sets forth one ground of sale which, under the facts as they appear, is erroneous, the court will nevertheless confirm the sale on other grounds, if any.[6]

The Form of the Petition.

In Heffner's App.,[7] the sale was refused on the grounds of the

(4) 203 Pa. 249 (1902).

(5) For some of the cases commenting on the necessity of setting out the facts, see Orwig's Est., 7 Pa. C. C. 71 (1889), 46 L. I. 99, 19 Phila. 158; Lambrecht's Est., 22 W. N. C. 24 (1888). See § 29, ante.

(6) Fell's Est., 14 Phila. 248 (1880), 9 W. N. C. 382, 38 L. I. 6.

(7) 119 Pa. 462 (1888), 21 W. N. C. 249.

inadequacy of the petition in that (1) it did not contain a description of the property, (2) did not set out that the petitioner had any interest, (3) description of the property contained in a separate paper concurring in the application will not cure want of averment of interest in the petitioner, (4) no copy of will attached.

"It (the petition) is defective in these respects:

"(1) It does not have a copy of the will annexed;

"(2) It need not describe all the real estate. That applies to a petition for a public sale to pay debts. Only the real estate proposed to be sold should be described.

"(3) There should be a separate petition for each property proposed to be sold. They should not be combined in one petition. Each petition stands alone, and if granted is in the line of title to the individual purchaser. This applies only where the purchasers are different, as in this case; of course, if the person buys two properties, or all, it is proper to have one petition.

"(4) The petition should state there are debts not of record, and annex a list of them, if known, but should not state as here, 'that the personal estate is insufficient to pay them.' Nor should any copy of inventory be annexed, nor list of debts, excepts those not of record, as referred to in the petition.

"(5) A petition under the Act of 1853 should be carefully drawn. (Appeal of Heffner et. al., 21 Weekly Notes, 249, 119 Pa. 462.) And this petition does not give any reason for the sale of either of the properties, nor why it will be for the interest and advantage of the parties interested that they should be sold. Nor do the affidavits give any reason for the sale; nor do the affiants say that the sale will be advantageous to the parties interested. The price offered may be a full price, but why the real estate should be sold at all is not given. If the sales are really to pay debts why should not the properties be sold at public sale?

"The petition as prepared cannot be granted in accordance with the Acts of Assembly and well settled practice."[8]

"The prayer of the petition should conclude that the purchaser may take a title in fee simple, indefeasible by any person or persons having a present or expectant interest in the premises; and that the purchase-moneys shall, in all respects, be substituted therefor, and be applied to the uses of the same persons, for the

(8) Hanna, P. J., in Lambrecht's Est., 22 W. N. C. 24 (1888).

same estate and interest, as the real estate sold had been held, except that tenant in tail should take the price after discharging liens. This prayer should be made to guard against any inference that the proceeds are to become absolute in the hands of the particular tenant, as upon the destruction of a contingent remainder by common recovery, the fee enures to him unless a deed to lead the uses of the recovery express another purpose. This will also remove all apprehension from the beneficiaries that the purchase-moneys will be diverted from subserving the same limitations that had before bound the realty sold; and will assure them that the security required to be entered shall stand for their benefit and security, and that the purchase-moneys be paid to them as required by the limitations."[9]

Forms of Petitions and Decrees.

A number of forms have been prepared covering the different cases which may arise. The auxiliary forms, such as joinder in the petition, order of sale, return to order of sale, affidavits of appraisers when required by local rule of court, etc., may be found in any form book devoted to orphans' court proceedings, and are therefore omitted, as no question of title or jurisdiction depends on the wording of any of them. It is only proposed to add forms of the petition and decree, all of which forms contemplate the case of the confirmation of a sale already made, which is the most direct and perhaps the most usual way of proceeding under the act. Where it is desired to have the court order the sale in advance, it is only necessary to alter the prayer of the petition so as to ask for a decree ordering a sale and to omit the averment in the petition of the sale already made. The other averments in the petition will remain the same.

Private Sale of Interest of a Minor in the Entire Premises.

In the Orphans' Court for the County of ————.

Term, 19—. No. ——.

Estate of Thomas Brown, a Minor.

To the Honorable the Judges of the said Court:

The petition of William Burns, guardian of Thomas Brown,

(9) Price on the Act for the Sale of Real Estate, (1874), p. 100.

owner in fee of the hereinafter described premises, respectfully represents:[10]

(1) (a) That on the 13th day of December, A. D. 1913, your petitioner was duly appointed guardian by your Honorable Court of the estate of the said Thomas Brown; or

(b)[11] That on the 13th day of December, A. D. 1913, your petitioner was duly appointed guardian of the estate of the said Thomas Brown by the Orphans' Court of ——— County, as of ——— Term, No. ———.

(2) That Daniel Brown being seized in fee of the premises hereinafter described, departed this life on the ——— day of ——— A. D. ———, intestate and unmarried, leaving to survive him issue, the said Thomas Brown, and no other child or issue of a deceased child.

(3) That the said premises are described as follows: (Here insert description of premises).

(4) That your petitioner has contracted to sell the said premises to Thomas L. Kane for the price of $5,000, by an agreement of sale, copy of which is hereunto annexed marked "Exhibit A."

(5) That the said sum of $5,000 is a better price than can be obtained for the premises at public sale, and that it will be to the interest and advantage of the said Thomas Brown to sell the premises for the price specified, because the improvements on the premises are old and dilapidated and rapidly deteriorating in value, and will require an expenditure of a large sum of money to put them in tenantable order fitting the neighborhood in which the lot is situate, as that neighborhood has changed from a residence to a business neighborhood, and the rents of the property have consequently declined and your petitioner can, by investing the said sum of $5,000 at the prevailing rates of interest, obtain a larger return than by renting the property at the rent it will command in its present dilapidated condition, as the gross income from

(10) It is desirable in the opening of the petition to set out the interest of the petitioner precisely. This is a necessary jurisdictional averment, and should be brought to the attention of the court in the beginning. If the interest is other than an interest in fee, the averment may be changed as follows: "Thomas Brown, owner of a vested remainder interest," "Thomas Brown, tenant for life," etc., etc.

(11) (b) Should be used where the guardian is appointed in another county. In such case it is not necessary to apply first to the court of the county of appointment.

the property for the years ——— and ——— was $——— and $———, respectively, and that the repairs and taxes, etc., to the property for the years ——— and ——— were $——— and $———, respectively. The net income, therefore, for the years ——— and ——— was $——— and $———, respectively.[12]

(6) That such sale may be made without injury or prejudice to any trust, charity or purpose for which the said premises are held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

(7) That the said premises are assessed for taxation for the year ——— at $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit B."[13]

Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1853, P. L. 503,[14] for a decree confirming the said sale and authorizing him to convey the said premises to the said Thomas L. Kane in fee simple, so that the title of the purchaser shall be indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ———, 19—, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of

(12) It is extremely important in the case of the sale of the property of a minor, where the minor is the only party interested, to give full information as to the value of the property and the income, so that the court may judge whether it is to the interest of the minor to sell. These considerations also apply to the case of a lunatic, habitual drunkard or any person under disability, but do not have the same force in the case where the party under disability has an undivided interest, and the other owners are sui juris. In that case their consent to the sale is very strong evidence of its propriety.

(13) This averment need only be inserted in jurisdictions where required by rule of court. Affidavits of experts should also be added when required by rule of court.

(14) Every petition should set out the act under which the petition is presented, so that there shall be no doubt whatever as to what jurisdiction is invoked in the case. This is frequently overlooked, counsel sometimes thinking that the court has power in equity to enter a decree irrespective of the terms of any statute. This does not appear to be the case, and since the jurisdiction must be pinned to some statute, it is helpful to the court and to counsel to always specify the statute in the petition.

Daniel Webster, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of the said Thomas Brown that the premises described in the petition should be sold to Thomas L. Kane at private sale for the sum of $5,000, and that the said price is better than can be obtained at public sale, and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said sale be confirmed, that the said William Burns, guardian of the said Thomas Brown, be and he is hereby authorized and empowered to convey the said premises ————, to Thomas L. Kane for the price of $5,000, the title of the purchaser to be a fee simple title indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $10,000.

————————, *J.*

Private Sale of Undivided Interest of a Minor.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF THOMAS BROWN, A MINOR.

To the Honorable the Judges of the said Court:

The petition of William Burns, guardian of Thomas Brown, a minor, owner of an undivided interest[15] in the premises hereinafter described, respectfully represents:

(1) That on the 13th day of December, A. D. 1913, your petitioner was duly appointed guardian by your Honorable Court of the estate of the said Thomas Brown.

(2) That the Daniel Brown being seized in fee of the premises hereinafter described, departed this life on ——— the day ———, intestate and unmarried, leaving to survive him as issue, Thomas Brown, George Brown, William Brown, Susan, intermarried with Lewis Rice, and Polly, intermarried with James Smith, and no other child or issue of a deceased child.

(15) See note 10, ante.

(3) That the said Daniel Brown was seized in fee at the time of his death of ALL THAT CERTAIN (here insert description of premises).

(4) That your petitioner is therefore the owner of an undivided one-fifth interest in the said premises.

(5) That the parties now interested therein are as set out in the following table, with the amount of their respective shares:

Thomas Brown, one-fifth.
George Brown, one-fifth.
William Brown, one-fifth.
Susan Rice, one-fifth.
Polly Smith, one-fifth.[16]

(6) That your petitioner and all of the other owners in fee of the said premises have contracted to sell the same to Thomas L. Kane for the price of $5,000 for the whole, by agreement of sale copy of which is hereunto annexed marked "Exhibit A."

(7) That all of the said owners who are sui juris have signified their willingness to join in the said sale by joining in this petition.

(8) That it would be to the interest and advantage of the said Thomas Brown to sell the premises for the terms in said agreement of sale set forth, because the price is better than could be obtained at public sale, and because otherwise it would be necessary to have partition proceedings to separate the ownership of the various persons interested, and by making the sale to the said Thomas L. Kane, the expense and delay of partition proceedings can be avoided. That it is not likely that the property will increase in value within the time necessary for the completion of partition proceedings. That the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

(9) That the said premises are assessed for taxation for the year—at the sum of $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[17]

(16) It is always important, where the interest is undivided, to set out in the petition in tabular form all the undivided interests with the fractional amounts thereof. This enables the court at a glance to see the proportional interest of the minor or the person making the petition.

(17) This averment need only be inserted in cases where the certificate is required by local rule of court.

Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1853, P. L. 503,[18] for a decree confirming said sale, and authorizing him to join in the conveyance of the premises to the said Thomas L. Kane for $5,000, upon receipt of the proportional share of the said Thomas Brown in the purchase-money so that the title of the purchaser shall be indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ——— day of ———, 19—, on consideration of the foregoing petition and affidavits thereto annexed, and on motion of Joseph Story, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of said Thomas Brown that the premises described in the foregoing petition, to wit, ————, should be sold to the said Thomas L. Kane for $5,000; that the said sum of $5,000 is a better price than could be obtained for the premises at public sale, and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said sale be confirmed, that the said William Burns, guardian of the said Thomas Brown, be and he is hereby authorized and empowered to join with the other parties in interest in the conveyance of the said premises to the said Thomas L. Kane for the price of $5,000 for the whole, first receiving the proportional share of the said minor in the said purchase-money, the title of the purchaser to be a fee simple title indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $2,000.[19]

————————, *J.*

(18) See note 14, ante.

(19) The minor having only a proportional share of the purchase-money, security need only cover the amount of that share.

Private Sale. Property Subject to Lien of Debts Not of Record.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of Sarah Brown, widow of Daniel Brown, and the tenant of a one-third interest for life[20] in premises hereinafter described, respectfully represents:

(1) That the said Daniel Brown died on the 15th day of January, A. D. 1914, intestate, leaving to survive him a widow, your petitioner, and issue five children, Thomas Brown, Henry Brown, James Brown, Susan, intermarried with Charles Davis, and Polly, intermarried with Lewis Rice, to and in whom the said premises did descend and vest under and by virtue of the intestate laws of the Commonwealth of Pennsylvania.

(2) That the said Daniel Brown died seized in fee, inter alia, of ALL THAT CERTAIN (here describe premises).

(3) That your petitioner and the children of the said Daniel Brown have entered into an agreement of sale with John Clark, in which they have agreed to convey the said premises for the sum of $20,000 by an agreement of sale, copy of which is hereunto annexed and marked "Exhibit A."

(4) That by reason of the death of the said Daniel Brown within two years, the premises are subject to the lien of his debts not of record.

(5) That the said Thomas, Henry, and James Brown, Susan Davis and Polly Rice, and the husbands of the said Susan and Polly, have expressed their willingness that the said premises should be sold for the price aforesaid, and have joined in this petition.

(6) That it will be to the interest and advantage of your petitioner and the children of the said Daniel Brown that the said premises shall be sold, for the reason that ————.

(7) That the said sum of $20,000 is a better price than could be obtained for the premises at public sale.

(8) That the said premises are assessed for taxation for the

(20) See note 10, ante.

year at the sum of $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[21]

(9) That the sale may be consummated without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1853, P. L. 503,[22] for a decree confirming said sale, and appointing John Jones, trustee, to carry out the same, deliver the deed to the purchaser, and receive the purchase-money, and providing that the title of the purchaser shall be indefeasible by any party or persons having a present or expectant interest in the said premises, he unprejudiced by any error in the proceedings in the court, and free from the lien of debts not of record of the said Daniel Brown.

And your petitioner will ever pray, etc.

Decree.

AND NOW, the ——— day of ———, A. D. 19—, on consideration of the foregoing petition and the affidavits thereunto annexed, and on motion of Edward Tilghman, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of all parties interested in the premises described in the foregoing petition, to wit (here refer to premises), that the same should be sold to John Clark for the sum of $20,000; that the said sum of $20,000, is a better price than could be obtained for the premises at public sale, and it further appearing that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said sale be confirmed, that John Jones be appointed trustee to carry out the same, that the said John Jones, trustee as aforesaid, be and he is hereby authorized and empowered, upon receipt of the purchase-money, to convey the said premises to John Clark in fee simple, the title of the purchaser to be indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court and

(21) This averment need only be inserted in case where the certificate is required by local rule of court.

(22) See note 14, ante.

free from the lien of debts not of record of the said Daniel Brown, deceased, the said John Jones first entering security in the sum of $40,000.

————————, *J.*

Private Sale of Trust Property. Time for Exercise of Power Expired.

IN THE COURT OF COMMON PLEAS FOR THE COUNTY OF ————.

Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of William Burns, trustee under deed of Daniel Brown, and interested as such[22a] in the premises hereinafter described, respectfully represents:

(1) That Daniel Brown, by deed dated the 15th day of January, 1898, conveyed the premises hereinafter described to your petitioner, William Burns, in trust, to collect the income thereof and pay over the same to Mary, the daughter of the said Daniel Brown, for her life, with remainder over after her death as therein limited, a copy of which deed is hereunto annexed marked Exhibit A."

(2) That the said premises are described as follows (here insert description of premises).

(3) That the said Mary is still alive, and that there is a power of sale in the said deed of trust which cannot now be exercised because by the terms of the said deed it is provided that the power shall be exercised within five years after the date thereof.

(4) That your petitioner has contracted to sell said premises at private sale to John Clark for the sum of $10,000 by agreement of sale, copy of which is hereunto annexed "Exhibit B."

(5) That he is unable to make title because the power of sale cannot now be exercised, and he therefore petitions the court, under the provisions of the Act of April 18, 1853, P. L. 503,[22a] for a decree confirming said sale, and authorizing the exercise of the power notwithstanding the circumstance that the time limit for its exercise has expired.

(6) That the said sum of $10,000 is a better price than the said

(22a) See note 10, ante.

premises would bring at public sale, and it is to the interest and advantage of the said trust estate and of the said Mary Brown that the same shall be sold for that price for the reason that (here insert reasons).

(7) That the said Mary Brown has signified her consent to the sale by joining herein.[23]

(8) That the said premises are assessed for taxation for the year ———, for the sum of $———, as appears by the certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit C."[24]

(9) That the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court for a decree ratifying and confirming the said private sale, and authorizing your petitioner to exercise the said power of sale and convey the premises in pursuance of the terms of the said agreement of sale; the title of the said purchaser to be indefeasible by any party or persons having a present or expectant interest in the said premises, to be in fee simple and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ———— on consideration of the foregoing petition and affidavits thereunto annexed, and it appearing that Mary Brown, sole cestui que trust, has joined therein, and on motion of John Marshall, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of the parties interested in the premises described in the foregoing petition, to wit (here refer to premises) that the same should be sold to John Clark for the sum of $10,000, and that the said price of $10,000 is a better price that the same would bring at public sale, and it

(23) In the case of trusts, there is some doubt as to how far it is necessary to notify all equitable interests in remainder. The petition as drawn only provides for notice to the life cestui que trust, which is probably enough. It may be, however, that circumstances or the court will require notice to all parties. See § 138, ante.

(24) This averment need only be inserted when required by local rule of court.

further appearing that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said sale be confirmed, and that William Burns, trustee under the deed of Daniel Brown, is authorized to exercise the power of sale conferred by the terms of said deed notwithstanding the circumstance that the time limit for its exercise has expired, and in pursuance thereof to convey the premises to John Clark for the sum of $10,000, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court, the said William Burns first entering security in the sum of $20,000.

————————, *J.*

(Petition to Join With Other Undivided Interests to Change Location of Right of Way Existing Over Adjoining Lands.)

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.

Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of William Burns, trustee under the will of Daniel Brown, deceased, and as such the owner in fee of[25] an undivided one-fifth interest in the premises hereinafter described, represents:

(1) That Daniel Brown died on the 15th day of January, A. D. 1905, unmarried and leaving to survive him five children, Thomas, George, James, Sallie, intermarried with Lewis Rice, and Polly, intermarried with James Smith, and having first made and published his last will and testament in writing, a true copy whereof is hereunto annexed marked "Exhibit A.," wherein and whereby he divided his residuary estate, including the premises hereinafter described, into five parts, one part to go to his son Thomas, one part to his son George, one part to his son James, one part to his daughter Sallie, and the other part to your petitioner in trust for his daughter Polly.

(25) See note 10, ante.

(2) That the said premises are described as follows: (here insert description of premises).

(3) That the persons interested in the said premises are therefore as shown in the following table, with the amount of their respective interests:

Thomas Brown, one-fifth.
George Brown, one-fifth.
James Brown, one-fifth.
Sallie Rice, one-fifth.
William Burns, trustee for Polly Smith, one-fifth.

(4) That by reason of an agreement made by the said Daniel Brown in his lifetime with John Clark, the owner in fee of certain premises adjoining the aforesaid premises on the east, the premises hereinbefore described became entitled to the use of a certain right of way twenty feet wide leading therefrom and on a course north 42° 73′ west over the lands of the said John Clark, to a certain road leading from the brick tavern in Providence Township to the Red Lion Hotel in Upper Darby Township.

(5) That the said John Clark is desirous of having the location of the said right of way changed in order that he may arrange for a more convenient use of his premises.

(6) That your petitioner and the other parties in interest in the said premises who have signified their consent by joining herein, have agreed with the said John Clark that the said right of way shall run on a course south 22° 49′ west instead of on the course which it runs at present, and that it shall be of the same width of 20′ feet as it is now.

(7) That the new location of the right of way will give the said premises an outlet to the aforesaid public road sixty feet shorter than the length of the present right of way.

(8) That it will be to the interest and advantage of all parties interested that the location of the said right of way shall be changed in the manner aforesaid.

(9) That the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1864, P. L. 462, Sec. 1,[26]

(26) See note 14, ante.

for a decree authorizing him to join with the other parties in interest in a proper agreement with the said John Clark, by which the location of the said right of way shall be changed in the manner hereinbefore more particularly set forth.

And he will ever pray, etc.

Decree.

AND NOW, the ———— on consideration of the foregoing petition, and on motion of Jeremiah Mason, Esq., counsel for the petitioner, and it appearing that all parties interested therein have joined in the said petition, and it further appearing that it will be to the interest and advantage of all of said parties that the location of the right of way described in the foregoing petition leading from the barn on the premises described therein to the said public road, shall be changed from the course upon which it now runs to the course designated in the petition, and that the change may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that William Burns, trustee under the will of Daniel Brown, deceased, be and he is hereby authorized to enter, with the other parties in interest in the said premises, into a proper deed with the said John Clark, by which the location of the said right of way 20 feet wide leading from the barn of the said premises to the said public road shall be changed from north 42° 73′ west to south 22° 49′ west the said right of way to be of the same width as the present right of way. The title of the said John Clark to the ground now occupied by the said right of way to be in fee simple, indefeasible by any party or persons having a present or expectant interest under the will of Daniel Brown, deceased, and be unprejudiced by any error in the proceedings of the court.[27]

————, *J.*

(27) No security is necessary in a case of this kind. No cash passes and the premises become entitled to a new right of way in place of the old one.

(Petition for Exchange.)

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of William Burns, guardian of Thomas Brown, owner in fee[28] of the premises hereinafter described, respectfully represents:

(1) That Daniel Brown died on the 17th day of December, A. D. 1913, intestate and unmarried, and leaving to survive him a son, the said Thomas Brown, and no other child or issue of a deceased child.

(2) That your Honorable Court did on the ——— day of ———, A. D. ——, duly appoint your petitioner guardian of the said Thomas Burns.

(3) That the said Daniel Brown was at the time of his death seized in fee of all that certain (here describe premises).

(4) That the said premises are bounded on the west by an irregular line as appears by a plan hereunto annexed marked "Exhibit A."

(5) That John Clark is the owner of the premises adjoining on the west, and the said John Clark and your petitioner have entered into an agreement to square and adjust the line dividing the said premises and the premises of the said John Clark, so that the same may run in a straight line instead of the irregular line upon which it is now laid out.

(6) That the change in the location of the line will not diminish the area of the premises belonging to the said Thomas Brown, it appearing that the arrangement agreed upon will give the said John Clark as much of the said Thomas Brown's land as the said John Clark will give to the said Thomas Brown of his land.

(7) That by plan hereunto annexed marked "Exhibit B.," it will appear what change in area will be made in the said premises by the relocation of the dividing line.

(8) That it will be to the interest and advantage of the said Thomas Brown that the said change in location should be made because the marketability of the title will be increased and the ex-

(28) See note 10, ante.

pense of maintaining the dividing fence between the properties will de decreased, the length thereof being found by measurement to be 100 feet less than if it were built upon the line now dividing the premises.

(9) That the said change in location may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court for a decree under the provisions of the Act of April 18, 1853, P. L. 503,[29] authorizing him as guardian aforesaid to, on behalf of the said Thomas Brown, enter into an agreement with the said John Clark for relocating the dividing line between the premises of the said Thomas Brown and the premises of the said John Clark, as shown on the plan hereunto annexed hereinbefore referred to marked "Exhibit B."

And he will ever pray, etc.

Decree.

AND NOW, ———— on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of Jeremiah Mason, Esq., counsel for the petitioner, and it appearing that it will be to the interest and advantage of the said Thomas Brown that the dividing line between the premises described in the petition and the premises of the said John Clark shall be changed so as to run upon the line marked in the plan shown on Exhibit B., and that the said change in location may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said William Burns, guardian of Thomas Brown, be and he is hereby authorized to execute a deed with the said John Clark, by which deed it shall be provided that the dividing line between the premises of the said Thomas Brown and the premises of the said John Clark shall run upon a line as follows:[30] (here insert the course of the line), and

(29) See note 14, ante.

(30) In a case like this, where there is no description in the petition, and where the new line appears only in the exhibit, it appears advisable that the decree should specifically recite the course of the new line.

conveying to the said John Clark all land of the said Thomas Brown situate to the west of the said line, and conveying to the said Thomas Brown all land of the said John Clark situate to the east of the said dividing line, and that the title of the said Thomas Brown to the land conveyed to him under the deed, and the title of the said John Clark to the land conveyed to him under the said deed shall each be in fee simple, indefeasible by any party or persons having a present or expectant interest therein, and be unprejudiced by any error in the proceedings of the court.[31]

————————, *J.*

Contingent Remainders to Children.

IN THE COURT OF COMMON PLEAS FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of Thomas Brown, tenant for life[32] of the premises hereinafter described, respectfully represents:

(1) That Daniel Brown by deed dated January 15, 1875, conveyed the premises hereinafter described to your petitioner, Thomas Brown, for life, with remainder after his death to such of his children as should be then living, as will appear by copy of said deed hereunto annexed marked "Exhibit A."

(2) That the said premises are described as follows: (here insert description of the premises).

(3) That your petitioner is now the father of three children, to wit, Maria, William and Annie, and there is likelihood that the class of persons to whom the remainder over, as aforesaid, is limited will increase in the future.

(4) That your petitioner has contracted to sell the said premises at private sale to John Clark for $10,000, by agreement of sale, copy whereof is hereunto annexed marked "Exhibit B."

(5) That he is unable to make title because of the contingent remainders, as aforesaid, limited to his children, and he therefore

(31) No security is necessary in this case.
(32) See note 10, ante.

petitions the court, under the provisions of the Act of April 18, 1853, P. L. 503, as amended by the Act of June 14, 1897, P. L. 144,[33] for a decree confirming said sale, and directing a conveyance freed and discharged of the said contingent remainders.

(6) That the said sum of $10,000 is a full and fair price for the said premises and more than the same would bring at public sale.

(7) That it is to the interest and advantage of all parties that the same should be sold for that price for the reason that (here insert reason).

(8) That the said sale may be made without injury or prejudice to any trust or charity or purpose for which the same is held, and without violation of any law which may confer an immunity or exemption from sale or alienation.

(9) That the said premises are assessed for taxation for the year ——— at the sum of $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[34]

Your petitioner therefore prays your Honorable Court for a decree ratifying and confirming the said private sale, and appointing John Jones, trustee to convey the said premises, and free, clear and discharged of the said contingent remainders, and to receive the proceeds under such directions as your Honorable Court may provide; and as preliminary thereto, that your Honorable Court appoint William Burns trustee to represent the said contingent remainders in posse,[35] the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the premises, and the purchase-money to be in all respects substituted for the land sold, and to be applied to the uses of the same persons for the same estate and same interest that it is now held.

And we will ever pray, etc.[35]

The preliminary decree should read as follow: "AND NOW, the ——— day of ———, 19—, on consideration of the foregoing

(33) See note 14, ante.

(34) This averment need only be inserted in cases where the certificate is required by local rule of court.

(35) In this case it will be necessary for the petition to be presented to the court, and then for the court to first make a decree appointing a trustee, after which the trustee will have to join in the petition.

petition, and on motion of Daniel Webster, Esq., William Burns is appointed trustee to represent the children of Daniel Brown, deceased, now born or hereafter to be born, and upon said appointment he is directed to examine into the foregoing petition and signify to the court his acqueiscence in or objections to the same."

————————, *J.*

Final Decree.

AND NOW, the —— day of ———, A. D. 19—, on consideration of the foregoing petition, and it appearing that William Burns who was appointed trustee to represent the children of Daniel Brown deceased, has signified to the court the fact that he has received notice of the foregoing petition, and that he has joined therein, and on motion of Daniel Webster, Esq., it appearing that it will to the interest and advantage of all the parties that the said premises ———————— should be sold to John Clark for the sum of $10,000; that the said sum of $10,000 is a better price than could be obtained for the premises at public sale, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED (1) that the said private sale to John Clark be and the same is hereby confirmed, (2) that John Jones is hereby appointed trustee to carry out the said sale and convey the premises to the purchaser, (3) that the said John Jones is hereby authorized and directed to convey the said premises to the said John Clark upon the receipt of the said $10,000, the title of the purchaser to be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the premises, and free, clear and discharged of the remainders limited to the children of Daniel Brown, deceased, and unprejudiced by any error in the proceedings of the court; the said purchase-money to be held by the said John Jones during the life of Thomas Brown, and at his death to be paid to the persons entitled under the said deed of Daniel Brown; the said John Jones first entering security in the sum of of $20,000.

————————, *J.*

Contingent Remainders to a Class Other Than Children.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of Thomas Brown, tenant for life[36] of the premises hereinafter described, respectfully represents:

(1) That Daniel Brown, who was an uncle of your petitioner, died on January 15, 1875, seized in fee of the premises hereinafter described, having made a will dated the ——— day of ———, a true copy of which is hereto annexed marked "Exhibit A." by which he devised the said premises to your petitioner for life, and after his death to the children of John Smith, who might then be living. The said premises are described as follow: (Here insert description of premises).

(2) That your petitioner contracted to sell the said premises to John Clark for $10,000, by agreement of sale, copy whereof is hereto annexed marked "Exhibit B." That he is unable to make title because of the contingent remainders, as aforesaid, children of John Smith, and he therefore petitions the court, under the provisions of the Act of June 15, 1897, P. L. 159,[37] for a decree confirming the said sale and directing a conveyance free and discharged of the said contingent remainders.[38]

(3) That the said sum of $10,000 is a full and fair price for the said premises and a better price than the same would bring at public sale.

(4) That it is to the interest and advantage of all parties that the same should be sold at that price for the reason that (here insert reason).

(5) That the said sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and

(36) See note 10, ante.

(37) See note 14, ante.

(38) The proceedings must here be in the Orphans' Court the limitations being other than to children. If in this case the title had been derived by deed, there is no jurisdiction to sell and discharge the contingent remainders, the Common Pleas in such case not having jurisdiction under the Act of June 14, 1897, P. L. 144.

without the violation of any law which may confer an immunity or exemption from sale or alienation.

(6) That the said premises are assessed for taxation for the year at the sum of $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[39]

(7) Your petitioner therefore prays your Honorable Court for a decree ratifying and confirming the said private sale, and appointing John Jones, trustee,[40] to convey the said premises free, clear and discharged of said contingent remainders, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the premises, and the purchase-money to be in all respects substituted for the land sold, and to be applied to the uses of the same persons for the same estate and same interest that it is now held, and as preliminary thereto, that your Honorable Court appoint William Burns, trustee, to represent the said contingent remainders in posse.

Preliminary Decree.

AND NOW, the ——— day of ———, 19—, on consideration of the foregoing petition, and on motion of William Mansfield, Esq., attorney for the petitioner, William Burns is appointed trustee to represent the children of John Smith who may be living at his death, and upon said appointment he is directed to examine into the foregoing petition and signify to the court his acquiescence in or objections thereto.

———————, *J.*

Final Decree.

AND NOW, the ——— day of ———, 19—, on consideration of the foregoing petition, and it appearing that William Burns, who was appointed trustee to represent the heirs of Thomas Brown, has signified to the court the fact that he has received notice of the foregoing petition, and that he has joined therein, and on motion of William Mansfield, Esq., it appearing that it will be to the interest and advantage of all the parties that the said premises, ———————, should be sold to John Clark for the sum of $10,000, that the said sum of $10,000 is a better price than could

(39) This averment need only be inserted in cases where the certificate is required by local rule of court.

(40) The sale may be made by the life tenant, if desired, and in such case he will give the bond and make the deed.

be obtained for the premises at public sale, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED (1) that the said private sale to John Clark be and the same is hereby confirmed; (2) that John Jones is hereby appointed trustee to carry out the said sale and convey the said premises (or that Thomas Brown is hereby authorized, etc.); (3) that the said John Jones is hereby authorized and directed to convey the said premises to the said John Clark upon receipt of the said $10,000, the title of the purchaser to be a fee simple title indefeasible by any party or person having a present or expectant interest therein, and free, clear and discharged of the remainders limited to the children of John Smith, and unprejudiced by any error in the proceedings of the court. The purchase-money to be held by the said John Jones (or Thomas Brown, as the case may be), and paid to the persons entitled under the will of the said Daniel Brown, deceased, the said John Jones (or Thomas Brown, as the case may be), first entering security in the sum of $20,000.

————————, *J.*

(Contingent Remainder to an Ascertained Person.)

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of Thomas Brown, tenant for life[41] of the premises hereinafter described, respectfully represents:

(1) That Daniel Brown died on the 15th day of January, A. D. 1875, seized in fee of the premises hereinafter described, having made a will dated ————————, a true copy whereof is hereunto annexed marked "Exhibit A.," by which he devised the said premises to your petitioner for life, and upon his death to his daughter, Sallie, if she should then be living.

(2) That the said Sallie has since intermarried with Lewis Rice.

(41) See note 10, ante.

(3) The said premises are described as follow: (Here insert description of premises).

(4) That your petitioner has contracted to sell the said premises to John Clark for $10,000 by agreement of sale copy whereof is hereunto annexed marked "Exhibit B."

(5) That he is unable to make title because of the contingent remainder so limited, as aforesaid, to the said Sallie Rice. He therefore petitions the court, under the provisions of the Act of April 18, 1853, P. L. 503,[42] for a decree confirming said sale and directing the conveyance free and discharged of the said contingent remainder.

(6) That notice has been given to the said Sallie Rice, and she has signified her consent to the said sale by joining herein.

(7) That the said sum of $16,000 is more than the premises would bring at public sale, and it is to the interest and advantage of all parties that the premises should be sold for that price for the reason that the property is subject to a mortgage which is now overdue and has been called in, in consequence whereof the parties will be under the necessity of raising money to pay off the mortgage, and they are unable to agree upon a proper adjustment of the burden of such encumbrance as between themselves, and the property is therefore likely to be sold by the sheriff under proceedings on the mortgage.

(8) That the said premises are assessed for taxation for the year ———, at $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed, marked "Exhibit —."[43]

(9) That the said sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court for a decree confirming said sale, and authorizing him to carry out the same by conveying the premises to the purchaser in fee simple, so that he may have a title indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court.

And the purchase-money to be in all respects substituted for the

(42) See note 14, ante.

(43) This averment need only be inserted by local rule of court.

land sold, and to be applied to the uses of the same persons for the same estate and same interest that it is now held.

And he will ever pray, etc.

Decree.

AND NOW, ————, on consideration of the foregoing petition, Sallie Rice interested by way of contingent remainder therein having joined with her husband therein, and on motion of John B. Gibson, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of all parties that the premises described in the foregoing petition, to wit, ————, should be sold to John Clark for the price of $10,000, the said sum of $10,000 being a better price than could be obtained at public sale, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED, ADJUDGED AND DECREED that the said private sale be confirmed, and that Thomas Brown be and he is hereby authorized to convey the same to the said John Clark for the price of $10,000, free, clear and discharged of the contingent remainder limited by the will of Daniel Brown to his daughter, Sallie Rice; the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court. The said sum of $10,000 to be held by the said Thomas Brown until his decease in order that the same may be paid over to the said Sallie Rice, if she be then living; the said Thomas Brown first entering security in the sum of $20,000.

————, *J.*

Executory Devise.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.

Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of Thomas Brown, executory devisee[44] of the premises hereinafter described, respectfully represents:

(44) See note 10, ante.

(1) That the said Daniel Brown died on the 15th day of January, A. D. 1875, seized in fee of the premises hereinafter described, having made a will dated ————————, a true copy whereof is hereunto annexed maked "Exhibit A.," by which he devised the said premises to George Brown for life, with a proviso that if the said George Brown should die without having married, the premises should be vested in your petitioner, and if the said George Brown should die a married man, the premises should go to his heirs and assigns forever.

(2) That the said premises are described as follows: (Here insert description of premises).

(3) That the said George Brown is still living, and your petitioner is desirous that the premises should be sold for the reason that ————————.

(4) That your petitioner has contracted to sell the said premises to James Clark for $20,000 by agreement of sale, copy whereof is hereunto annexed marked "Exhibit B."

(5) That he is unable to make title to the property because he is only interested as an executory devisee, and although the said George Brown is willing to consent to the said sale of the said premises, as aforesaid, and has joined in this petition, yet your petitioner and George Brown are unable to agree upon a proper division of the purchase-money, and therefore your petitioner prays your Honorable Court for a decree under the provisions of the Act of April 18, 1853, P. L. 503,[45] directing the sale of the premises free and clear of the executory devise, and substituting the purchase-money for the land so that if the said George Brown should die without being married, your petitioner may be entitled to the entire amount of the said purchase-money.

(6) That the said sum of $20,000 is a better price than could be obtained at public sale, and it is to the interest and advantage of all parties that the premises should be sold for that price for the reason that ————————.

(7) That the said premises are assessed for taxation for the year ———— at $————, as appears by certificate of the Board of Revision of Taxes hereunto annexed, marked "Exhibit —."[46]

(8) That the said sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held,

(45) See note 14, ante.

(46) This averment need only be inserted by local rule of court.

and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court for a decree confirming the said sale, and appointing William Burns trustee to carry out the same, deliver the deed to the purchaser, and hold the purchase-money until the death of George Brown in accordance with the provisions of the will of the said Daniel Brown, deceased, so that the title of the purchaser shall be in fee simple and indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court.

And we will ever pray, etc.

Decree.

AND NOW, the ——— day of ———, 19—, on consideration of the foregoing petition, and on motion of Roger B. Taney, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of all parties that the premises described in the forgoing petition, to wit, ———————— should be sold to John Clark for the price of $20,000, and that the said sum of $20,000 is a better price than could be obtained at public sale, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED, ADJUDGED AND DECREED that the said private sale be confirmed, that William Burns be appointed trustee to carry out the same, that William Burns be and he is hereby authorized to convey the said premises to John Clark for $20,000, the title of the purchaser to be in fee simple, free, clear and discharged of the executory devise to Thomas Brown, and indefeasible by any party or persons having a present or expectant interest in the said premises, and be unprejudiced by any error in the proceedings of the court; the said sum of $20,000 to be held by the said William Burns, trustee, until the death of George Brown, and then paid over to the person entitled under the limitations in the will of the said Daniel Brown, deceased, the said William Burns first entering security in the sum of $40,000.

————————, *J.*

For the Sale of Redeemable Ground Rent.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF THOMAS BROWN, A MINOR.

To the Honorable the Judges of the said Court:

The petition of William Burns, guardian of Thomas Brown, a minor, who is owner in fee[47] of the ground rent hereinafter described, respectfully represents:

(1) That your petitioner was duly appointed guardian of the said Thomas Brown by your Honorable Court on the ——— day of ———, 19—.

(2) That Daniel Brown being seized in fee of the ground rent hereinafter described, departed this life on the ——— day of ———, 19—, intestate and unmarried, leaving to survive him the said Thomas Brown, and no other child or issue of a deceased child.

(3) That the said yearly ground rent is described as follows: (Here insert description).

(4) That the said yearly ground rent is redeemable, and by the terms of the deed reserving the same, copy of which is hereunto annexed marked "Exhibit A.," it is provided that the same may be redeemed upon payment of the capital sum of $5,000.

(5) That your petitioner has contracted to sell the said yearly ground rent to John Clark for the sum of $5,000, and all arrearages of ground rent to the day of settlement, by agreement of sale, copy of which is hereunto annexed marked "Exhibit B."

(6) That it will be to the interest and advantage of the said minor that the ground rent should be sold for the reason that the purchase price is the full capital sum of the rent, and is more than could be realized for the same at public sale; and the premises out of which the said ground rent issues are dilapidated, deteriorating in value, and at the present time not worth much more than the said sum of $5,000.

(7) That there is no prospect of any increase in the value of the premises, and the ground rent is therefore in jeopardy by reason of the small security for its payment. The interest of the minor will therefore be better subserved by realizing the principal

(47) See note 10, ante.

sum of the rent so that your petitioner may invest it in a safer security, although the rate of interest will be lower than that now received.

(8) That the sale may be made without injury or prejudice to any trust, charity or purpose for which the ground rent is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

(9) That the premises out of which the said ground rent is issued are assessed for taxation for the year ——— for $———, as appears by certificate hereunto attached.[48]

Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1853, P. L. 503,[49] for a decree confirming the said sale, and authorizing and empowering him to convey the said ground rent to the said John Clark for the price aforesaid; the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ———————, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of John B. Gibson, Esq., counsel for the petitioner it appearing that it will be to the interest and advantage of the said Thomas Brown that the said yearly ground rent (here insert reference to ground rent) should be sold for $5,000, which is a better price than can be realized at public sale, and that the same may be done with without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation IT IS ORDERED AND DECREED that the said sale by William Burns, guardian of Thomas Brown, to John Clark be and the same is hereby confirmed, and the said William Burns, guardian as aforesaid, is hereby authorized and empowered, upon receipt of the said sum of $5,000 and arrearages of the said ground rent to the day of payment, to convey the same to the said John Clark, the title of the purchaser to be in fee simple, indefeasible by any

(48) This averment only need be inserted when required by local rule of court.

(49) See note 14, ante.

party or persons having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court. The said William Burns first entering security in the sum of $10,000.

————————, *J.*

Sale of Irredeemable Ground Rent.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF THOMAS BROWN, A MINOR.

To the Honorable the Judges of the said Court:

The petition of William Burns, guardian of Thomas Brown, a minor, who is owner in fee[50] of the ground rent hereinafter described, respectfully represents:

(1) That your petitioner was duly appointed guardian of the estate of the said Thomas Brown by your Honorable Court on the ——— day of ———, A. D. 19—.

(2) That Daniel Brown being seized in fee of the ground rent hereinafter described, departed this life on the ————, intestate and unmarried, leaving to survive him the said Thomas Brown, and no other child or issue of a deceased child.

(3) That the said yearly ground rent is described as follows: (Here insert description).

(4) That your petitioner has sold the said yearly ground rent to Thomas L. Kane for the price of $10,000, by agreement of sale, copy of which is hereunto annexed marked "Exhibit A.," which sum is twice the capital sum specified in the deed reserving the ground rent as the amount to be paid for the extinguishment of the same.

(5) That it will be to the interest and advantage of the said Thomas Brown that the said yearly ground rent should be sold for the price aforesaid, because the annual ground rent is now $300, being 6% on the said sum of $5,000, and the sum of $10,000 for which the ground rent is to be sold will upon being invested at the current rates of interest, produce an income of about $500 per annum, a difference in income which will be clearly to the advantage of the said Thomas Brown.

(50) See note 10, ante.

(6) That the said ground rent is irredeemable, as appears by the covenant in the deed reserving the same, executed by ——— ——— to ——— ———, dated ———, recorded at ——— in ———, a copy of which (deed or covenant) is hereunto annexed marked "Exhibit B."

(7) That the said price of $10,000 is a better price than could be realized for the said ground rent at public sale.

(8) That the said premises are assessed for taxation for the year ———, at $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed, marked "Exhibit—."[51]

(9) That the said sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court for a decree, under the provisions of the Act of April 18, 1853, P. L. 503,[52] confirming the sale of the ground rent, and authorizing your petitioner to convey the same to the said Thomas L. Kane for the price agreed upon; the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest therein, and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, on the ———, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of Edward Tilghman, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of the said Thomas Brown that the said yearly ground rent (here refer to ground rent), should be sold to Thomas L. Kane for $10,000, and it further appearing that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, and that the said sum of $10,000 is a better price than could be obtained for the same at public sale, IT IS ORDERED AND DECREED that the said sale by William Burns, guardian, as aforesaid, be and the same is hereby confirmed, and the said William Burns, guardian,

(51) This averment need only be inserted by local rule of court.

(52) See note 14, ante.

as aforesaid, is hereby authorized and empowered, upon receipt of the said sum of $10,000, and all arrearages of ground rent to the day of settlement, to convey the said yearly ground rent to Thomas L. Kane, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $20,000.

————————, *J.*

Authority to Join in Amicable Partition.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of William Burns, guardian of George Brown, owner of an undivided interest[53] in the premises hereinafter described, respectfully represents:

(1) That Daniel Brown died on February 15, 1900, intestate, unmarried and leaving to survive him three children, Thomas Brown, George Brown and William Brown, of whom the said George Brown is now under the age of twenty-one years, and no other child or issue of a deceased child.

(2) That your Honorable Court did on the ——— day of ———, 19—, appoint your petitioner the guardian of the said George Brown.

(3) That the said Daniel Brown was at the time of his death seized in fee of all those certain (here recite description of the various premises).

(4) That your petitioner and the said Thomas and William Brown have agreed upon an amicable voluntary partition of the aforesaid premises, by which partition they have agreed that the said William Brown shall have the following premises (here insert description of William's premises); that the said George Brown shall have the following premises (here insert description of George's premises); that the said Thomas Brown shall have

(53) See note 10, ante.

the following premises (here insert description of Thomas' premises).

(5) That owing to the circumstance that the said George Brown is under the age of twenty-one years, he is unable to join in the said volunary partition, and this petition is therefore presented to your Honorable Court under the provisions of the Act of April 18, 1853 P. L. 503,[54] for a decree authorizing your petitioner as guardian aforesaid to execute a proper deed carrying out the aforesaid partition.

(6) That it will be to the interest and advantage of the said George Brown and of all the parties in interest that the said partition should be made in order to avoid the expense and delay of partition proceedings.

(7) That the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

(8) That the said premises are assessed for taxation for the year at the sum of $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[55]

(9) That the said Thomas Brown and George Brown have signified their consent to the said partition by joining herein.

Your petitioner therefore prays your Honorable Court to ratify and confirm the aforesaid partition, and authorize and empower him as guardian aforesaid to execute the necessary deeds to carry out the same so that the title of the parties in severalty thereunder shall be in fee simple, indefeasible by any party or person having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ——— day of ———, A. D. ——, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of Rufus Choate, Esq., counsel for the petitioner, it appearing that it is to the interest and advantage of the said parties to make the said partition, and it further appearing that the same may be done without injury or prejudice to any

(54) See note 14, ante.

(55) This averment need only be inserted in cases where the certificate is required by local rule of court.

trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said partition be confirmed, and that William Burns, guardian of George Brown aforesaid, be and he is hereby authorized and empowered to execute the necessary deeds of partition with the said Thomas and William Brown, and that the title of the said parties to the premises under the said deeds of partition shall be in fee simple, indefeasible by any party or persons having a present or expectant interest therein, and be unprejudiced by any error in the proceedings of the court.

————————, *J.*

Form of Petition for Ratification of Partition[56] Already Made.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

The petition of William Burns, trustee under the will of Daniel Brown, deceased, and as such interested[57] in the premises hereinafter described, respectfully represents:

(1) That Daniel Brown died on the 15th day of January, A. D. 1910, having first made and published his last will and testament, a copy whereof is hereunto annexed marked "Exhibit A.," wherein and whereby he did divide his residuary estate into three parts, one part thereof he gave to his son, Thomas Brown; one part to his son, George Brown, and the other one-third equal part to your petitioner, in trust for his daughter, Sallie, intermarried with Lewis Riley.

(2) That the said Daniel Brown was at the time of his death seized in fee of all those certain (here insert description of premises).

(56) It sometimes happens that through inadvertence parties under disability have entered into an amicable partition, and the defect is subsequently discovered, whereupon it will appear that the title of the several tenants in common under the partition deed will be defective. In such case the Orphans' Court may ratify and confirm the partition and remove the defect.

(57) See note 10, ante.

(3) That the said Thomas and George Brown and your petitioner having agreed upon a fair, just and equal partition of the aforesaid premises of which Daniel Brown died seized, by deed dated the 15th day of June, 1912, made an amicable voluntary partition thereof, which deed has been duly recorded in the Recorder's Office in and for the County of ———, in Deed Book, ———, by which deed the following partition of the premises was made; that the said George Brown should have (here insert George's premises); that the said Thomas Brown should have (here insert Thomas's premises); that your petitioner as trustee under the will of Daniel Brown should have (here insert the trustee's premises).

(4) That since the making of the said deed the said parties have entered into possession of the several purparts, and have remained in undisturbed possession thereof from that time to the present date.

(5) That the said partition is an equal, fair and just one, to the interest and advantage of all parties, and does no injury to any trust, charity or purpose for which the same is held, and does not violate any law which may confer an immunity or exemption from sale or alienation.

(6) That the said Thomas Brown and George Brown have been duly notified of this petition, as appears by their joinder herein, and the said Sallie Riley and Lewis, her husband, have signified their consent to the said partition by joining herein in like manner.

(7) That the said premises are assessed for taxation for the year ——— at $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed, marked "Exhibit —."[58]

(8) That your petitioner has since been advised that by reason of the fact that there is no power in the will of Daniel Brown conferring authority to make partition, that his joinder as trustee in the aforesaid deed of partition is null and void and of no effect. He therefore petitions your Honorable Court under the provisions of the Act of April 18, 1853, P. L. 503,[59] for a decree ratifying and confirming the aforesaid partition and your petitioner's joinder therein, and for a decree ratifying the same, and directing that the titles of the several tenants in common shall be

(58) This averment need only be inserted by local rule of court.

(59) See note 14, ante.

in fee simple, indefeasible by any party or persons having a present or expectant interest therein and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ——— day of ———, A. D. 19—, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of Daniel Webster, Esq., counsel for the petitioner, it appearing that the said partition which has been made by the parties thereto under deed dated the ——— day of ———, 19—, recorded in Recorder's Office in and for the County of ———, in Deed Book ———, is a fair, just and equal partition, and is to the interest and advantage of the parties, and that it does not injure or prejudice any trust, charity or purpose for which the same is held, and does not violate any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED (1) that the said partition be and the same is hereby confirmed, (2) that the joinder in the aforesaid partition deed dated ———, recorded ———, by the said William Burns, trustee under the will of Daniel Brown, deceased, be and the same is hereby ratified and confirmed, with the same force and effect as if the court had authorized the joinder of the said William Burns therein prior to the date of the deed. AND IT IS FURTHER ORDERED that the title of the several tenants in common under the said deed of partition shall be in fee simple, indefeasible by any party or persons having a present or expectant interest therein, and be unprejudiced by any error in the proceedings of the court.

———————, *J.*

(Persons Absent and Unheard From for More Than Seven Years.)

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.

Term, 19—. No. ——.

ESTATE OF THOMAS BROWN, SUPPOSED TO BE DECEASED.

To the Honorable the Judges of the said Court:

The petition of Henry Brown, a tenant in common in fee[60] of the hereinafter described premises, respectfully represents:

(60) See note 10, ante.

(1) That Daniel Brown died on the 15th day of January, A. D. 1874, intestate and unmarried, leaving to survive him issue five children as follows: Thomas Brown, Henry Brown, James Brown, Susan, since married to Lewis Rice, Polly since married to James Smith, and no other child or issue of a deceased child.

(2) That the said Daniel Brown was at the time of his death seized of ALL THAT CERTAIN (here insert description of premises).

(3) That the persons interested in the said premises are as set forth in the following table:

Thomas Brown, one-fifth.
Henry Brown, one-fifth.
James Brown, one-fifth.
Susan Rice, one-fifth.
Polly Smith, one-fifth.

(4) That Thomas Brown, a son of the said Daniel Brown, departed this jurisdiction on or about the first day of January, A. D. 1900, and has been absent and unheard from for more than seven years, that is to say, from that time to the time of the filing of this petition, under circumstances from which the law would presume his decease.

(5) That your petitioner and the other parties in interest have contracted to sell the said premises to John Clark for the price of $10,000 by agreement of sale, copy of which is hereunto annexed marked "Exhibit A."

(6) That your petitioner and the other parties in interest are unable to convey the interest of the said Thomas Brown, who has been absent and unheard from under the circumstances aforesaid.[61]

(7) That this petition is presented to your Honorable Court under the provisions of the Act of April 18, 1853, P. L. 503,[62] for

(61) It does not seem necessary to set out in the petition in detail the evidence concerning the departure or absence of the person supposed to be deceased. The court will undoubtedly in every such case, unless the presumption of death has already been made out in other proceedings, as, for instance, where the personal estate has been distributed under the Act of 1885, appoint an examiner to take testimony or direct a hearing before the court. It seems therefore only necessary to set out the formal averment in the petition itself.

(62) See note 14, ante.

the purpose of conveying the interest of the said Thomas Brown, supposed to be deceased as aforesaid.

(8) That the price of $10,000 aforesaid is a better price than could be obtained for the said premises at public sale, and it is to the interest and advantage of the said parties that the sale should be made in order that the parties may avoid the expense of partition proceedings and the disadvantage of holding the premises longer in the present condition of undivided ownership, with one of the owners absent where he cannot be communicated with.

(9) That the said premises are assessed for taxation for the year ———, at $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed, marked "Exhibit —."[63]

(10) That the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

(11) That the other parties in interest, to wit, Henry Brown, James Brown, Susan Rice and her husband, Lewis Rice, Polly Smith and her husband, James Smith, have signified their acquiescence in the said sale and joined in this petition.

Your petitioner therefore prays your Honorable Court for a decree confirming said sale and appointing William Burns, trustee, to carry out the same on behalf of the said Thomas Brown, supposed to be deceased, and directing him to convey the same to the said John Clark upon receipt of the proportionate share of the said Thomas Brown in the purchase-money, the title of the purchaser to be a fee simple interest and indefeasible by any party or persons having a present or expectant interest in the said premises, and be unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.[64]

Preliminary Decree.

AND NOW, ————————, on consideration of the foregoing

(63) This averment need only be inserted when required by local rule of court.

(64) It is not necessary to insert forms covering the intermediate proceedings relating to the appointment of an examiner or to a hearing before the court. When those proceedings have been so concluded that the court is satisfied that the presumption of death is made out, a preliminary decree may be entered as follows.

petition, and on motion of Joseph Story, Esq., counsel for the petitioner, it appearing that the said Thomas Brown has been absent and unheard from for more than seven years, that is to say, from the ————————, under circumstances from which the law will presume his decease, IT IS ORDERED AND DECREED that notice be given by publication (here insert the terms of the publication) that the foregoing petition will be persented to the court on the ——— day of ——— at —— A. M., and a decree be made confirming the said sale unless cause be shown to the contrary.

————————, *J.*

Decree.

AND NOW, the ————————, on consideration of the foregoing petition and affidavits thereunto annexed, it appearing that due notice by publication has been given as directed by the preliminary decree heretofore entered, and it further appearing that no objections have been made to the granting of the petition, and on motion of Joseph Story, Esq., counsel for the petitioner, it appearing that Thomas Brown, son of Daniel Brown, deceased, has been absent and unheard from for more than seven years under circumstances from which the law will presume his decease; and it further appearing that it is to the interest and advantage of all parties in interest that the premises described in the foregoing petition, to wit, ————————, should be sold to the said John Clark for the sum of $10,000 for the whole, the said sum of $10,000, being a better price than could be obtained at public sale, and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED (1) that the aforesaid sale to John Clark for $10,000 be and the same is hereby confirmed, (2) that William Burns is appointed trustee to carry out the same on behalf of the said Thomas Brown, supposed to be deceased as aforesaid, (3) that the said William Burns, trustee as aforesaid, be and he is hereby authorized to join in the deed of the said premises to the said John Clark for the price of $10,000 for the whole, upon receipt of the share of the said Thomas Brown therein, the title of the purchaser to be a fee simple title indefeasible by any party or persons having a present or expectant interest in the said premises; and unpreju-

diced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $4,000.

————————, *J.*

Public Sale of Trust for a Charity.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of William Burns, trustee under the will of Daniel Brown, deceased, and as such interested[65] in the premises hereinafter described, respectfully represents:

(1) That Daniel Brown died on the 15th of December, A. D. 1895, having first made and published his last will and testament in writing dated the ————————, a true copy whereof is hereunto annexed marked "Exhibit A.," by which he devised a certain tract of land, adjoining his farm to your petitioner, in trust, upon which he directed his trustee to construct and maintain a school for the education of poor young girls of the neighborhood.

(2) That the said premises are described as follows: (Here insert description of premises).

(3) That your petitioner caused said premises to be exposed to public sale at the salesroom of Messrs. Sims & Sons, at 10 o'clock A. M., on Wednesday, April 1, 1914, due notice of said sale having been properly given by full advertisement for at least twenty days by handbills posted in at least twenty of the most public places in the county, and by notice published in two newspapers, to wit, the ——— and the ———, not less than three times in each, due proof of which publication is hereto annexed marked "Exhibit B."[66]

(65) See note 10, ante.

(66) In the case of a petition to ratify a public sale, it should be formally set out that the notice prescribed by the act has been given, and proof should be attached to the publication of that notice. This proof should be in the shape of an affidavit by some disinterested party that the publication was made, giving a copy of the notice printed in the papers, and by affidavit of the party who posted the handbills that he actually posted them in twenty public places, or this matter may be regulated by a local rule of court. If so, the petition should conform thereto.

(4) That the premises were sold on the day and at the time aforesaid to John Clark for $20,000, he being the highest and best bidder, and that being the highest and best bid for the same.

(5) That it will be to the interest and advantage of all parties that the premises should be sold for the price aforesaid, it appearing that the lot of ground so devised by Daniel Brown for the purpose of constructing a school thereon is unsuitable for the purpose, a large factory having recently been constructed in the neighborhood thereof, the noise, smoke and dust from which will disturb the quiet and privacy necessary for the protection and education of poor young young girls.

(6) That the said premises are assessed for taxation for the year ———, at $———, as appears by certificate of the Board of Revision of Taxes hereunto annexed, marked "Exhibit —."[67]

(7) That your petitioner has made an arrangement with the trustees of the ———— association, situate in the county aforesaid, which is provided with sufficient buildings and instructors to adequately care for the education of poor young girls, by which arrangement the income arising from the fund left under the will of Daniel Brown, deceased, shall be used for the maintenance at that home of a certain number of poor young girls, pending the arrangement your petitioner may be able to make for the selection of a suitable lot of ground and the construction of a building to carry out the charitable wishes of the testator.

Your petitioner therefore avers that it is to the interest and advantage of all parties that the sale my be made, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

He therefore prays your Honorable Court for a decree under the provisions of the Act of April 18, 1853, P. L. 503,[68] confirming the said sale, and directing him to carry out the same so that the title of the purchaser shall be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

(67) This averment need only be inserted when required by local rule of court.

(68) See note 14, ante.

Decree.

AND NOW, ————————, on consideration of the foregoing petition, and on motion of John Marshall, Esq., attorney for the petitioner, it appearing that it will be to the interest and advantage of the said parties that the premises described in the foregoing petition, to wit: ———————— should be sold to John Clark for the price of $20,000, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said public sale to John Clark be confirmed, and that William Burns, a trustee under the will of Daniel Brown, deceased, be and he is hereby authorized to convey the said premises to the said John Clark, for the price of $20,000, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $40,000.

————————, *J.*

Public Sale, Subdividing Tract and Vacating Roads.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

To the Honorable the Judges of the said Court:

The petition of William Burns, trustee under the will of Daniel Brown, deceased, and as such interested[69] in the premises hereinaeter described, respectfully represents:

(1) That Daniel Brown died on the 28th day of June, 1902, having first made his will dated ————————, a true copy whereof is hereunto annexed marked "Exhibit A.," by which he devised his residuary estate to your peitioner upon the trusts therein declared.

(2) That the said Daniel Brown died seized, inter alia, in fee of all that certain (here describe premises).

(69) See note 10, ante.

(3) That the said premises, consist of a large tract of land situate in the outskirts of the city of Pittsburgh, and over which the said Daniel Brown in his lifetime laid out certain streets, intending to divide the said tract into bulding lots.

(4) That the said streets have not been accepted by the public authorities, and that it now appears advantageous to vacate the said streets and lay out others in lieu thereof, and divide the said tract of land into a different division of lots, as appears by a plan hereunto annexed marked "Exhibit B."

(5) That it is to the interest and advantage of the said trust estate and of all the cestuis que trustent therein named, all of whom have signified their consent to the sale hereinafter described by joining herein, that the said premises should be sold because they are unproductive, subject to a liability for taxation and in the neighborhood of a growing part of the city so that the premises are now ripe for improvement, and by selling the same for that purpose the trust estate will be materially benefited, as the purchase price will, when invested, yield a greater income than the premises in their present condition, and your petitioner is unable to improve the premises by building thereon, as such improvement would require the expenditure of a large sum of money which he would would have to borrow for that purpose.

Your petitioner therfore caused the said premises to be exposed to public sale, as per the said plan hereunto annexed, at the auction rooms of J. W. Sims & Co., on February 20, 1910; due notice thereof having first been given for at least twenty days by handbills posted in at least twenty of the most public places in the said city of Pittsburgh, and by notice published in at least two newspapers, to wit, the ——— and the ———, not less than three times in each, that is to say, in each paper on the ———, on the, and on the ———, due proof of which publication is hereunto annexed marked "Exhibit C."

(6) That at the public auction sale of the said premises held as aforesaid, a number of the lots of ground described in the said plan were sold to various purchasers, as follow:

Lot No. 1 to Thomas Clark for $500.

Lot No. 2 to William Smith for $500.

(etc., etc., here specify the lots sold to the different purchasers), the prices so realized being the highest and best price in each case bidden for the same.

(7) That the said premises may be sold without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

(8) That it is desirable to vacate the streets so laid out by the said Daniel Brown, as aforesaid, and in lieu thereof to open and dedicate the streets shown upon the plan marked "Exhibit B."

(9) That there is no power of sale in the will of the said Daniel Brown, deceased.

(10) That the said premises are assessed for taxation for the year ——— at $——— as appears by the certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[70]

Your petitioner therefore prays your Honorable Court for a decree under the provisions of the Act of April 18, 1853, P. L. 503,[71] ratifying and confirming the said several sales of the said lots of ground as hereinbefore mentioned to the said several purchasers, and vacating the said streets laid out by the said testator and opening the streets laid out by your petitioner, as aforesaid, and authorized and empowering your petitioner to convey by deed of dedication the said streets to the public authorities and the said tracts of ground to the several purchasers; the title of each purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest therein, and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ————————, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of John Marshall, Esq., counsel for the petitioner, it appearing that all the cestuis que trustent interested under the will of Daniel Brown have joined therein, and that it will be to the interest and advantage of all parties that the said premises should be subdivided as set out in the said petition, and the streets laid out and dedicated by the testator should be vacated, and that the streets laid out by the said William Burns, trustee under the will of said Daniel Brown, should be opened, and further, that the said several

(70) This averment need only be inserted when required by local rule of court.

(71) See note 14, ante.

lots of ground should be sold to the said purchasers as follows, to wit: (here insert), and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the sales of the said lots of ground to the several purchasers for the price aforesaid be and they are hereby confirmed; that the said William Burns be and he is hereby authorized to, in order to carry out the said sales, subdivide the said tract as set out in the said plan marked "Exhibit B.," and that he is further authorized to lay out and dedicate to public use the streets described and mentioned on said plan, and to convey the same to the city of Pittsburgh by deed of dedication; an he is further authorized and empowered to carry out the several contracts of sale made with the purchasers as aforesaid, and to convey to each the lot of ground sold to him upon the receipt of the purchase price; the title of each purchaser to his lot of ground to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of ———.[72]

———, *J.*

Private Sale. Trustee Without Power of Sale.

IN THE COURT OF COMMON PLEAS FOR THE COUNTY OF ————.
Term, 1914. No. ——.

IN RE TRUST UNDER THE DEED OF DANIEL BROWN.

The petition of William Burns, trustee under the deed of Daniel Brown, and interested as said trustee[73] in the premises hereinafter described, respectfully represents:

(1) That Daniel Brown, by deed dated the 31st day of January, 1865, granted and conveyed the premises hereinafter de-

(72) Security should be in double the amount of the purchase price of all the lots sold.

(73) See note 10, ante.

scribed, inter alia, unto John Jones, in trust, to collect the rents, issues and profits thereof, and pay over the net income to the said Daniel Brown during the remainder of his natural life, and from and after his decease to pay over the income to the children whom he might leave surviving for their lives in equal shares with remainders over, as therein mentioned, a copy of which said deed is hereunto annexed marked "Exhibit A."

(2) That some of the children of the said Daniel Brown, to wit: Henry Brown, James Brown and Thomas Brown, are still living and the trusts declared under the said deed are still subsisting. That the said John Jones subsequently departed this life, and your petitioner, William Burns, was duly appointed substitute trustee in his place by your Honorable Court on the 15th day of January, A. D. 1900.

(3) That the said deed of Daniel Brown, inter alia, conveyed ALL THAT CERTAIN (here insert description of premises).

(4) That the said deed of Daniel Brown contains no power authorizing the trustee to sell any of the real estate therein conveyed.

(5) That your petitioner has entered into a contract of sale with John Clark, a copy of which is hereunto annexed marked "Exhibit B.," by which he has agreed to sell the aforesaid premises in fee simple for the sum of $10,000.

(6) That the said Thomas, Henry and James Brown, cestui que trust as aforesaid, have consented to the said sale, as is evidenced by their joinder in this petition.[73a]

(7) That it will be to the interest and advantage of the said trust estate, as well as to the interest and advantage of the said Thomas, Henry and James Brown, that the said premises should be sold to the said John Clark for $10,000 for the reason that ———.

(8) That the said sum of $10,000 is a better price than could be obtained for the premises at public sale.

(9) That the said premises are assessed for taxation for the year —+— at the sum of $———, as appears by certificate of

(73a) In the case of trusts, there is some doubt as to how far it is necessary to notify all equitable interests in remainder. The petition as drawn only provides for notice to the life cestui que trust, which is probably enough. It may be, however, that circumstances or the court will require notice to all parties. See § 138, ante.

the Board of Revision of Taxes hereunto annexed marked "Exhibit C."[74]

(10) That the said sale may be consummated without injury or prejudice to any trust, charity or purpose for which the same is held, and without violation of any law which may confer an immunity or exemption from sale or alienation.

(11) Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1853, P. L. 503,[75] to enter a decree ratifying the aforesaid sale, and authorizing your petitioner to consummate the sale by conveying the said premises to the said John Clark in fee simple, so that the title of the purchaser shall be indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ——— day of ———, A. D. 19—, on consideration of the foregoing petition and affidavits thereunto annexed, it appearing that all of the cestuis que trustent have joined therein, and on motion of William Tilghman, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of the trust under the deed of the said Daniel Brown, as well as to the interest and advantage of the said Thomas, Henry and James Brown, cestuis que trustent thereunder, that the premises described in the foregoing petition, to wit: (here refer to premises specifically) should be sold to the said John Clark for the sum of $10,000, and that the said sum of $10,000 is a better price than could be obtained at public sale, and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that the said sale by William Burns, substituted trustee, as aforesaid to John Clark be and the same is hereby confirmed, and that the said William Burns, substituted trustee as aforesaid, be and he is hereby authorized, empowered and directed, upon the receipt of the said

(74) This averment need only be inserted in cases where the certificate is required by local rule of court.

(75) See note 14, ante.

sum of $10,000, to convey the said premises to the said John Clark. The title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court, the said William Burns first entering security in the sum of $20,000.

————————, *J.*

Private Sale of Interest of a Lunatic.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF GEORGE BROWN, A LUNATIC.

To the Honorable the Judges of the said Court:

The petition of William Burns, committee in lunacy of George Brown, a lunatic, the said George Brown being the owner in fee of the premises hereinafter described,[76] respectfully represents:

(1) That Daniel Brown died on the 15th day of January, 1875, sized in fee of the premises hereinafter described, intestate, unmarried and leaving to survive him a son, the said George Brown, and no othed issue or issue of a deceased child him surviving.

(2) That the said premises are described as follows: (here insert description of premises).

(3) That by inquisition proceedings in the court of common pleas of the County of ———, of ——— Term, No. ——, the said George Brown was duly adjudged a lunatic, and your petitioner was duly appointed committee of his person and estate.

(4) That your petitioner has contracted to sell the said premises to John Clark for $10,000, by agreement of sale copy whereof is hereunto annexed marked "Exhibit A."

(5) That it will be to the interest and advantage of the estate of the said lunatic that the property should be sold for the price aforesaid because the property is dilapidated, decaying, in bad need of repair and cannot be rented to advantage without the expenditure of a considerable sum of money. The gross income from the property for the last three years has been ———, the expenditures for water rent, taxes and repairs has been ———,

(76) See note 10, ante.

and the net annual income for the three years has been ———. The petitioner can by investing the sum of $10,000 at the prevailing rates of interest receive a larger revenue than can be obtained by renting the property in its present condition.

(6) That the said sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law which may confer immunity or exemption from sale or alienation.

(7) That notice of the proposed sale has been given to the wife (or next of kin, as the case may be), of the said George Brown, and she has signified her consent to the said sale by joining herein.[77]

(8) That the said sum of $10,000 is a better price than could be obtained at public sale.

(9) That the said premises are assessed for taxation for the year ———, for the sum of $———, as appears by the certificate of the Board of Revision of Taxes hereunto annexed marked "Exhibit —."[78]

Your petitioner therefore prays your Honorable Court for a decree under the provisions of the Act of April 18, 1853, P. L. 503,[78a] confirming the said sale, and authorizing him to carry out the same by conveying the premises to the purchaser in fee simple for the sum of $10,000, so that he may have a title indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the court.

And he will ever pray, etc.

Decree.

AND NOW, the ————————, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of Horace Binney, Esq., counsel for the petitioner, it appearing that the wife (or next of kin, as the case may be), of the said George Brown has signified her consent to the said sale by joining herein,

(77) Although it is not necessary under the terms of the act to give notice to the wife or next of kin in the case of proceedings concerning the interest of a lunatic, it is undoubtedly much better practice to do so, and this averment is therefore inserted.

(78) This averment need only be inserted when required by local rule of court.

(78a) See note 14, ante.

and it further appearing that the will be to the interest and advantage of the estate of the said George Brown, a lunatic, that the premises described in the foregoing petition, to wit, ————, should be sold to John Clark for $10,000, and that the said sum of $10,000 is a better price than could be obtained at public sale, and that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held, and without the violation of any law conferring immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that William Burns, committee of the estate of George Brown, a lunatic, be and he is hereby authorized to convey the said premises to the said John Clark, for the sum of $10,000, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest therein, and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $20,000.

————, *J.*

Form for Mortgage.

IN THE ORPHANS' COURT FOR THE COUNTY OF ————.
Term, 19—. No. ——.

ESTATE OF DANIEL BROWN, DECEASED.

The petition of William Burns, guardian of Thomas Brown, owner in fee of[79] the premises hereinafter described, respectfully represents:

(1) That on the 13th day of December, A. D. 1913, your petitioner was duly appointed guardian by your Honorable Court of the estate of the said Thomas Brown.

(2) That Daniel Brown died on December 1, 1913, intestate, unmarried, and leaving to survive him an only child, Thomas Brown.

(3) That the said Daniel Brown was at the time of his decease seized in fee of all ALL THAT CERTAIN (here insert description).

(4) That the said premises are subject to the lien of debts of

(79) See note 10, ante.

the said Daniel Brown not of record, and to the lien of a mortgage of $1,500 which was executed by the said Daniel Brown on the ——— day of ———, recorded in the County of ———, in Book ———, page ——.

(5) That the said Daniel Brown left no personal estate, and the total amount of his debts aggregate about $3,000.

(6) That the said premises are worth the sum of $10,000, as appears by affidavits of real estate experts hereunto attached.

(7) That the said premises are assessed for taxation for the year ———, for the sum of $———, as appears by the certificate of the Board Revision of Taxes hereunto annexed marked "Exhibit[80] B."

(8) That the said premises are improved and yielding an assured annual revenue, and that it would be to the disadvantage of the said minor that they should be sold for the debts of the said Daniel Brown, as they are likely to increase in value in the future and can probably be kept rented permanently at a profitable figure. It will therefore be to the interest and advantage of the said Thomas Brown that your petitioner should borrow the sum of $4,500 to be secured by a bond and mortgage in the usual form upon the said premises, the proceeds of the said mortgage to be used in paying off the said mortgage of $1,500, and in paying the debts of the said Daniel Brown.

(9) That your petitioner has arranged to borrow from John Kane the sum of $4,500 for a period of three years, with interest payable at 5%, the said sum to be secured by a bond and mortgage on said premises.

(10) That the said mortgage may be created without injury or prejudice to any trust, charity or purpose for which the property is held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.

Your petitioner therefore prays your Honorable Court, under the provisions of the Act of April 18, 1853, P. L. 503,[81] for a petition authorizing him to execute a mortgage in the usual form accompanied by a bond with a warrant of attorney in the usual form to John Kane in the sum of $4,500, to be secured on the said premises, and that the title of the mortgagee shall be unprejudiced

(80) This averment need only be inserted in jurisdictions where required by rule of court.

(81) See note 14, ante.

by any error in the proceedings of the court and indefeasible by any party or persons having a present or expectant interest in the premises.

And he will ever pray, etc.

Decree.

AND NOW, the ————————, on consideration of the foregoing petition and affidavits thereunto annexed, and on motion of Joseph Story, Esq., counsel for the petitioner, it appearing that it will be to the interest and advantage of the said Thomas Brown that his guardian, William Burns, be authorized to borrow of John Kane the sum of $4,500 for three years at five per cent., the same to be secured by bond and mortgage on the premises described in the foregoing petition, and that the said mortgage may be created without injury to any trust, charity or purpose for which the same is held, and without the violation of any law which may may confer an immunity or exemption from sale or alienation, IT IS ORDERED AND DECREED that William Burns, guardian of Thomas Brown, be and he is hereby authorized and empowered to borrow the sum of $4,500 from John Kane for three years at five per cent., and secure the same by executing a mortgage on the premises described in the foregoing petition (here refer to premises), accompanied by a bond and warrant of attorney in the usual form, the title of the said John Kane to be indefeasible by any party or persons having a present or expectant interest in the premises, and unprejudiced by any error in the proceedings of the court; the said William Burns first entering security in the sum of $9,000.

————————, *J.*

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